TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 37

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

vs.

SANTA FE PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 23, 1941
CERTIORARI GRANTED MARCH 10, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 717

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

vs.

SANTA FE PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona
Suit to quiet title and for an accounting

No. E-190—Prct.

In Equity

THE UNITED STATES OF AMERICA, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona,

Plaintiff,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

COMPLAINT.

Comes now the United States of America, as Guardian of the Indians of the tribe of Hualpai, variously spelled Hualapai, or Walapai, etc., a tribe of Indians who have lived within the exterior limits of the present State of Arizona from time immemorial and are now residing upon an Indian reservation in said State known as the Hualpai Indian Reservation, now embraced within the judicial district of the State of Arizona, and brings this, its bill of complaint against Santa Fe Pacific Railroad Company, a corporation; and plaintiff avers, for a first cause of action:

1. That this action is brought by Frank E. Flynn, United States Attorney for the District of

Arizona, by the direction and under the authority of the Attorney General of the United States. That this action is brought by the United States of America and arises under the laws of the United States and is a cause in which the District Courts have original jurisdiction.

2. The defendant, Santa Fe Pacific Railroad Company, is a corporation duly incorporated under and by virtue of an Act of [4] Congress approved March 3, 1897, but doing business, and authorized to do business in the State and District of Arizona, and elsewhere.

3. The plaintiff, United States of America, is now and for a long time past has been the owner in fee simple of all that certain tract, piece and parcel of land within the exterior limits of the Hualpai (or Huaiapai) Indian Reservation, within the State and District of Arizona, which was set aside and reserved by executive order of President Chester A. Arthur on January 4, 1883, for the use and occupancy of the said Hualpai tribe of Indians.

4. The tribe of Hualpai Indians, in the said State of Arizona, and the Indians comprising said tribe, at all times mentioned herein, have been and now are tribal Indians, and have been and now are wards of this plaintiff, non sui juris, and incompetent to manage their own affairs; that this suit is brought by plaintiff in its own right, and on behalf of said tribe and the Indians thereof, in

its capacity as guardian and trustee of said Indians and their property.

5. At all times material to this complaint, and long prior thereto, the Hualpai tribe were and now are in possession of and occupying the lands within the exterior boundaries of the Hualpai Reservation, as hereinafter described.

6. The creation of a military reservation of the lands hereinafter described was recommended by duly constituted authorities of the United States Army then in charge of said Hualpai tribe, on July 8, 1881, subject to the approval of the President, and the lands hereinafter described were at that time set apart as a Military Reservation for the subsistance and better control of the Hualpai Indians.

7. On August 4, 1882, the then Secretary of War confirmed the order creating the Hualpai Reservation as a [5] Military Reservation, and on September 5, 1882, the then Commissioner of Indian Affairs recommended to the Secretary of the Interior the establishment of the reservation, herein described and referred to, as an Indian reservation. On January 2, 1883, the then Secretary of the Interior submitted to the President of the United States, with his favorable recommendation, a draft of an executive order for the withdrawal of said lands in the Territory of Arizona as an Indian Reservation.

8. Pursuant to recommendation in the last paragraph referred to, on January 4, 1883, the President set aside and reserved for the use and occupancy of the Hualpai Indians the said lands, describing same as follows:

> Beginning at a point on the Colorado River five (5) miles eastward of Tinnakah Spring; thence south twenty (20) miles to crest of high mesa; thence south 40° east twenty-five (25) miles to a point of Music Mountains; then east fifteen (15) miles; thence north 50 degrees east thirty-five (35) miles; thence north thirty (30) miles to the Colorado River; thence along said river to the place of beginning; the southern boundary being at least two (2) miles south of Peach Spring, and the eastern boundary at least two (2) miles east of Pine Spring. All bearings and distances being approximate,

which lands as thereafter surveyed are more particularly described as follows:

> Beginning at a point on the left bank of the Colorado River located in Sec. 21, T. 31 N., R. 15 W., G. & S.R.M.
>
> Thence South 20 miles to an Iron Post marked and described by General Land Office Survey as 20 mile corner, located in Sec. 32, T. 28 N., R. 15 W., G. & S. R. M.
>
> Thence South 39 deg. 58 min. East, 1 mile;
>
> Thence South 40 deg. 08 min. East ½ mile;

Thence South 39 deg. 49 min. East, ½ mile;
Thence South 40 deg. 02 min. East, ½ mile;
Thence South 40 deg. 16 min. East, ½ mile;
Thence South 39 deg. 54 min. East, ½ mile;
Thence South 40 deg. 00 min. East, 2½ miles;
Thence South 40 deg. 11 min. East, ½ mile;
Thence South 40 deg. 00 min. East, 2 miles;
Thence South 40 deg. 07 min. East, ½ mile;
Thence South 40 deg. 14 min. East, ½ mile.
Thence South 40 deg. 00 min. East, 3 miles;

[6]

Thence South 39 deg. 41 min. East, ½ mile;
Thence South 40 deg. 00 min. East, ½ mile;
Thence South 40 deg. 17 min. East, ½ mile;
Thence South 39 deg. 39 min. East, ½ mile;
Thence South 40 deg. 00 min. East, 4 miles;
Thence South 39 deg. 57 min. East, ½ mile;
Thence South 40 deg. 02 min. East, ½ mile;
Thence South 40 deg. 00 min. East, 6 miles;
to the 45 mile or Southwest corner, located in Sec. 1, T. 24 N., R. 13 W., G. & S.R.M.

Thence East 15 miles to the 60 mile or Southeast Corner, located in Sec. 5, T. 24 N., R. 10 E., G. & S.R.M.

Thence North 50 deg. 00 min. East, 1½ miles;
Thence North 50 deg. 10 min. East, 1 mile;
Thence North 50 deg. 00 min. East, 1 mile;
Thence North 50 deg. 10 min. East, ½ mile;
Thence North 50 deg. 00 min. East, 7½ miles;
Thence North 49 deg. 57 min. East, ½ mile;

Thence North 50 deg. 00 min. East, 7 miles;

Thence North 50 deg. 05 min. East, ½ mile;

Thence North 50 deg. 10 min. East, 1½ miles;

Thence North 50 deg. 00 min. East, 14 miles;

to the 95 mile corner located in Sec. 12, T. 28 N., R. 6 W., G. & S.R.M.

Thence North 31 miles, more or less, to the Northeast corner located on the South or left bank of the Colorado River;

Thence down that stream to the place of beginning.

9. The defendant, Santa Fe Pacific Railroad Company, claims alternate odd numbered sections, as surveyed, within the exterior boundaries of the lands described in this cause of action, as successor to the Atlantic and Pacific Railroad Company, the grantee in the Act of Congress of July 27, 1866 (14 Stat. L. 272). To that extent its claim is adverse to the title of plaintiff, the United States of America, and to the right of occupancy of said Hualpai tribe of Indians. Said adverse claim of the defendant is without any foundation or right whatever in law or equity.

It is further alleged that the lands subject to the claim of defendant were not, at the date of the passage of said Act of Congress, of July 27, 1866, (14 Stat. L. 272), public lands of the United States within the meaning of said Act, but were reserved, or otherwise appropriated, under the public policy

of the United States and under the terms of the said Act of July [7] 27, 1866, for the exclusive use and occupancy of said tribe of Hualpai Indians until voluntarily ceded by said tribe of Indians, the same having been at all times material herein and from time immemorial the ancestral home of said tribe, and so occupied by them; and,—that said tribe of Hualpai Indians never ceded the said lands, or any part thereof.

10. The defendant has from time to time unlawfully entered upon portions of said Hualpai Reservation and committed acts of trespass thereon by using the same, or leasing the same to others for use, and by surveying or attempting to survey portions of said reservation, and by designating thereon boundaries of tracts, by running furrows, driving stakes, digging ditches, laying pipe lines, and by constructing telephone lines, dams and reservoirs, buildings and fences, thereon and thereover; and said defendant threatens to continue its said acts of trespass, and thereby has interfered, and threatens to continue to interfere with the possession, occupancy and use of said Hualpai Reservation, or parts thereof, by said Hualpai tribe, and the Indian members thereof.

11. Plaintiff further alleges that the claim of said defendant, under the said Act of Congress, of July 27, 1866, and the acts of trespass in the last paragraph referred to, cast a cloud upon the title of plaintiff to the lands, herein described and re-

ferred to, and, upon the right of occupancy, use and possession of, said lands by the said tribe of Indians and members thereof; and, that said defendant threatens to exclude said tribe of Indians, and its members, from the peaceful occupation, use, possession and enjoyment of said lands, or parts thereof, within the said reservation herein described. [8]

12. By the terms of the Act of Congress of July 27, 1866, the Atlantic and Pacific Railroad Company was required to complete construction of the railroad by July 4, 1878, and had not constructed its railroad through the said Hualpai Indian Reservation as plaintiff is informed and believes and therefore alleges upon information and belief, and had not constructed said railroad through said reservation upon the date of the military order of July 8, 1881, or of the executive order of January 4, 1883, above referred to.

13. The United States of America and the said tribe of Hualpai Indians, at all times material to this cause of action, have been, and now are, in the open, notorious, actual, peaceable, and exclusive possession of said real property, and every part thereof, adverse to the whole world, with color of title, and have continued in such occupation and possession for more than twenty (20) years last past.

14. Damages at law cannot be estimated and are incapable of exact determination and are inadequate

to remedy or compensate for the injuries herein set forth; and the right, claim and title of said Hualpai tribe to the lands above referred to cannot be enforced at law without a multiplicity of suits, all involving the same questions and the consideration of the same statutes, either of the United States or of the State or former Territory of Arizona; and the right of said Hualpai tribe and the Indians thereof to protection against the trespasses of the defendant continuing, and threatening to continue, as aforesaid, and the removal of the cloud existing by reason of the Act of Congress of July 27, 1866, (14 Stat. L. 272), create irreparable injury and damage and can only be adequately remedied in equity. [9]

Second Cause of Action

1. For a second and further cause of action Plaintiff reiterates and restates all that is alleged in Paragraphs 1, 2, 4, and 14 of the first cause of action of this bill of complaint to which reference is hereby made as fully as though set forth at length herein.

2. The plaintiff, United States of America, as guardian of the Hualpai tribe of Indians, at all times material to this cause of action has been and, except as herein specified and set forth, is the owner in fee simple of all those certain tracts, pieces and parcels of land lying south and west of the Hualpai Indian Reservation, described as follows:

Beginning at a point on the left bank of the Colorado River located in Sec. 21, T. 31 N., R. 15 W., G. & S.R.M., which is the Northwest corner of the Hualpai Indian Reservation; thence South twenty miles to an iron post marked and described by General Land Office Survey as Twenty-mile Corner, located in Sec. 32, T. 28 N., R. 15 W., G. & S.R.M., being the West boundary of the Hualpai Indian Reservation as officially surveyed; thence in a Southeasterly direction to the Forty-five Mile or Southwest Corner of the Hualpai Indian Reservation as officially surveyed, located in Sec. 1, T. 24 N., R. 13 W., G. & S.R.M.; thence East fifteen miles to the Sixty-mile or Southeast Corner, of said Hualpai Indian Reservation, located in Sec. 5, T. 24 N., R. 10 W., G. & S.R.M.; thence North approximately fifty degrees East, thirty-five miles to the Ninety-five-mile corner of the Hualpai Indian Reservation as officially surveyed, located in Sec. 12, T. 28 N., R. 6 W., G. & S.R.M.; thence North thirty-one miles, more or less, to the Northeast corner of the Hualpai Indian Reservation, or the point of intersection of the Eastern line of said Reservation with the Colorado River; thence along said Colorado [10] River Eastward to the mouth of Cataract Creek; thence following the meandering of said Cataract Creek to its source on Bill Williams Mountain in approximately Section 17, Township 21 North, Range 2 East, G. & S.R.B. & M., more particularly described as being Latitude 35° 12', Longi-

tude 112° 12′ 16″. Thence in a southwesterly direction approximately 63 miles to the source of the Santa Maria River, being the juncture of Sycamore and Kirkland Creeks, and located 4 miles southeast of Ship Mountain in approximately Section 21, Township 14 North, Range 7 West, G. & S.R.B. & M.; thence following the meandering of the Santa Maria River to the juncture with the Bill Williams Fork, now called the Williams River, in approximately Section 8, Township 11 North, Range 12 West, G. & S.R.B. & M.; thence following the meandering of the Big Williams Fork, or Williams River to its point of junction with the Colorado River; thence following the meandering of the Colorado River as the Western and Northern boundaries of the tract therein described to the place or point of beginning, except that a portion of the reservation set aside for the use and occupancy of the Mojave Indians is excepted therefrom, the said area excluded being more particularly described by metes and bounds as follows:

Begninning at the Northeast corner of the Fort Mojave Indian Reservation,

Thence

South 0° 35′ 14″ West 24.02 Chains to mile corner No. 1

South 0° 17′ 03″ West 40.06 Chains to mile corner No. 1½

South 0° 26′ 04″ West 40.00 Chains to mile corner No. 2

South 0° 32′ 56″ West 40.12 Chains to mile corner No. 2½

South 0° 29′ 03″ West 40.07 Chains to mile corner No. 3

South 0° 31′ 13″ West 40.10 Chains to mile corner No. 3½

South 0° 29′ 03″ West 39.98 Chains to mile corner No. 4

South 0° 29′ 03″ West 40.10 Chains to mile corner No. 4½

South 0° 35′ 06″ West 40.22 Chains to mile corner No. 5

South 0° 38′ 06″ West 7.31 Chains to East side center monument

South 1° 03′ 19″ West 32.87 Chains to mile corner No. 5½

South 1° 03′ 19″ West 40.22 Chains to mile corner No. 6

South 1° 03′ 25″ West 40.10 Chains to mile corner No. 6½

South 1° 03′ 25″ West 40.10 Chains to mile corner No. 7

South 1° 03′ 25″ West 40.10 Chains to mile corner No. 7½

South 1° 03′ 25″ West 40.10 Chains to mile corner No. 8

South 1° 04′ 28″ West 37.74 Chains to Southeast corner of Reservation [11]

South 76° 17′ 28″ West 42.26 Chains to mile corner No. 9

South 76° 17′ 28″ West 80.00 Chains to mile corner No. 10

South 76° 17′ 28″ West 4.00 Chains to left or East Bank of the Colorado River.

Thence

Northerly along the left bank of the river approximately 9 miles to the North boundary of the reservation,

Thence

South 56° 51′ 52″ East 56 Chains to point of beginning.

The Reservation is located in Townships 18 and 19 North, Range 22 West, Gila and Salt River Meridian, and this description is based upon a survey made by the General Land Office as shown by plat accepted January 23, 1931. The boundaries, with the exception of the river boundary, are monumented on the ground.

3. Plaintiff further alleges that at the time of the passage by the Congress of the United States of the Act of July 27, 1866 (14 Stat. L. 272) purporting to grant to the Atalantic and Pacific Railroad Company, the predecessor in interest of the defendant herein, every alternate section of public land, not mineral, to the amount of twenty sections per mile on each side of the railroad to be constructed, and at the time of filing of the map of definite location of said railroad on March 12, 1872, by said Atlantic and Pacific Railroad Company, the

said Hualpai Indian tribe were occupying all of the lands, in the last paragraph described, and have continued so to occupy and possess all of said lands up to the filing of this complaint.

4. Plaintiff further alleges that at the time of the passage of the granting Act of July 27, 1866 (14 Stat. L. 272) and at the time of the filing of the map of definite location of said railroad, March 12, 1872, the lands in this cause of action, described and referred to, were not public lands within the terms of said Act of Congress, but were lands owned in fee by the United States of America and reserved or otherwise appropriated and subject to the claims and right of occupancy of said tribe of Hualpai Indians.

5. Santa Fe Pacific Railroad Company claims alternate odd numbered sections, not lieu lands, as surveyed, within the [12] limits of the exterior boundaries of the lands described in Paragraph 2 of this cause of action, as successor to the Atlantic and Pacific Railroad Company, the grantee in that certain Act of Congress of July 27, 1866 (14 Stat. L. 272), and to that extent its claim is adverse to the plaintiff, the United States of America, as guardian and trustee of said Hualpai tribe of Indians, and to the right of occupancy of said Hualpai tribe of Indians, existing at the time of the passage of said Act of Congress, and continuing to the date of the filing of this complaint. Said adverse claim of

the defendant is without any right whatever and the lands subject to said claim were not, at the date of the passage of said Act of Congress, or at this time, public lands of the United States within the meaning of said Act, but were lands reserved or otherwise appropriated under the public policy of the United States and under the terms of the said Act of July 27, 1866 (14 Stat. L. 272) for the use and occupancy of said tribe of Hualpai Indians, and subject to the claim or right of occupancy until voluntarily ceded by said tribe of Indians, the same having been at all times material herein the ancestral home of said Hualpai tribe of Indians.

The claims of said defendant in the last paragraph referred to are subordinate to the title and right of occupancy of said Hualpai Indian tribe, and the assertion thereof by said defendant with the resultant trespasses casts a cloud upon the title, possession and right of ocupancy of said Hualpai tribe, and the members thereof, and the defendant threatens to exclude said tribe of Indians, and the individual members thereof, from the peaceful enjoyment and use of the lands referred to, in this cause of action, under their right of occupancy thereof.

7. Under the terms of said Act of Congress of July 27, 1866, (14 Stat. L. 272) the grant to the Atlantic and Pacific Railroad Company only attached to public lands to which the [13] United

States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said railroad was designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said alternate sections had been granted, sold, released, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands were required to be selected by the grantee, under said Act of Congress, in lieu thereof as directed in said Act. It was further specifically provided that the Indian title to all lands falling under the operation of the Act, referred to, and acquired in the donation to the grantee named in the Act should be extinguished as rapidly as should be consistent with public policy and the welfare of the Indians, but only by their voluntary cession. It is alleged by plaintiff that the grant to the Atlantic and Pacific Railroad Company under said Act of Congress of July 27, 1866 (14 Stat. L. 272), did not attach to the alternate, odd numbered sections, as surveyed, within the limits of the land described in Paragraph 2 of this cause of action; that the title of the Hualpai tribe of Indians under its right of occupancy, herein alleged, constituted under the public policy of the United States and under the express terms of the said Act of Congress a reservation or appropriation of said lands for the use and occupancy of said tribe of Indians, and is a claim or right to said

lands in said tribe of Indians, under the terms of said Act of Congress.

8. Plaintiff further alleges that between the years 1852 and 1872 the plaintiff sent a number of agents to the Territory of Arizona charged with the duty, among other things, of ascertaining the whereabouts and extent of the ancestral home of the Hualpai Indian tribe, whose reports defined the character and extent of the occupancy of said tribe, which was recognized [14] thereafter by the President of the United States and other executive officers of the Government and attained the status and dignity of an Indian Reservation without formal designation as such.

9. That patents to alternate, odd numbered sections of said lands in Paragraph 5 referred to were from time to time issued by the United States to the Santa Fe Pacific Railroad Company, successor to the said Atlantic and Pacific Railroad Company, in substantially the form, exclusive of dates and descriptions of land, of the copy thereof hereto attached and made a part hereof as Exhibit "A".

That said patents were issued under a mistake of law and of fact that the said lands were not subject to title, claim or right of said Hualpai tribe of Indians arising by reason of prior occupancy, use and possession of said lands by the said tribe of Hualpai Indians, as alleged in this cause of action.

Plaintiff further alleges that the occupancy of

said lands by said tribe of Hualpai Indians is a claim or right, which under said Act of Congress (14 Stat. L. 272) has not been extinguished by the voluntary cession thereof by said tribe, and, that the patents issued to the defendant herein, as alleged in this paragraph, are void because issued in contravention of the express terms of said Act of Congress (14 Stat. L. 272) and should be cancelled unless the lands therein described have been subsequently assigned to innocent holders and assignees, and, that defendant should be required to make a full and complete disclosure of all conveyances, assignments, or transfers of said lands or any part thereof.

10. The plaintiff is informed and believes and therefore alleges upon information and belief that the defendant has sold, rented, leased, or contracted so to do, large numbers of tracts or parcels of land so patented to it, and derived large amounts of income from such sales and rentals from divers and [15] sundry persons, unknown to plaintiff, all of which constitutes a fraud up on the plaintiff and a violation of the right of occupancy of said tribe of Hualpai Indians, for which defendant should be required to make an accounting.

Wherefore, plaintiff prays that said defendants be required to disclose the facts and nature of any claim whatsoever made or asserted by it adverse to the plaintiff, the United States of America as guar-

dian of said tribe, and to the claim, right of occupancy and title of said Hualpai tribe as aforesaid, and that thereupon it may be adjudged and decreed that any and all right, title or interest claimed or asserted by said defendant in, to or upon the lands and premises hereinabove averred, owned by plaintiff and occupied by said Hualpai Indians, may be adjudged and decreed to be null and void, or, if found valid, be adjudged and decreed to be subject to the continued right of occupancy and use by said Hualpai tribe, and that if it be adjudged and decreed that said defendant has not any estate, right, title or interest whatever in or to said land and premises, that the title to said premises and all thereof may be quieted in the plaintiff, subject to said right of occupancy and use of said tribe of Hualpai Indians; that the said defendant be required to disclose the extent of its claims, and assignments or conveyances thereof, and to account for all rents, issues and profits derived from the leasing, renting or use of the lands subject to said right of occupancy by said Hualpai tribe, and that upon final decree herein the defendant, its agents or other representatives be perpetually enjoined from further asserting any right, title or interest in or to said lands above described and from trespassing thereon or interfering with the full possession and occupancy thereof [16] by the said Hualpai tribe of Indians, and that plaintiff may

have such other and further relief as to the court may *see* proper.

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[17]

EXHIBIT "A"

PATENT

Dated .....

United States of America to
Santa Fe Pacific Railroad Company.

To all to whom these presents shall come, greeting:
Whereas, By the Act of Congress approved July

27, 1866, entitled "An Act granting lands to aid in the Construction of a Railroad and Telegraph line, from the States of Missouri and Arkansas to the Pacific Coast," there was granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said Railroad and Telegraph line to the Pacific Coast, "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any state and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the general land office"; and

Whereas, official statements bearing dates December 16, 1882, April 19, 1881, January 7 and December 17, 1880, and November 3, 1883 have been filed in the general Land Office, showing that the commissioners appointed by the President, under the provisions of the fourth section of the said act of Congress, approved July 27, 1866, have reported to him that the line of said Railroad and telegraph, from a point in Township eight north of Range two

east, Territory of New Mexico, and ending at a point on the west bank of the Colorado River in the State of California, has been constructed and fully completed and equipped in the manner prescribed by the said Act of Congress; and

Whereas, Certain tracts of land have been listed by the duly authorized land agent of the said Atlantic and Pacific Railroad Company, or its successor in interest as shown by his original list approved by the local officers, and now on file in the General Land Office; and

Whereas, It is shown by evidence filed in the office of the Secretary of the Interior, that the Santa Fe Pacific Railroad Company under a purchase at foreclosure sale of the property and rights of the Atlantic and Pacific Railroad Company, and by compliance with the provisions of the Act of Congress approved March 3, 1887, (29 Stat. 622), became the lawful successor in interest of the said Atlantic and Pacific Railroad Company; and [18]

Whereas, The said tracts of land lie coterminous to the constructed line of road, and are particularly described as follows, to-wit:

(Description of lands)

Now Know Ye, That The United States of America, in the consideration of the premises, and pursuant to said Acts of Congress, has given and granted, and by these presents does give and grant, unto the said Santa Fe Pacific Railroad Company,

successor in interest to the Atlantic and Pacific Railroad Company, and to its successors and assigns, the tracts of land listed as aforesaid and described in the foregoing. To have and to hold the said tracts with the appurtenances thereof, unto the said Santa Fe Pacific Railroad Company, successor as aforesaid, and to its successors and assigns forever.

In Testimony Whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be herewith affixed.

Given under my hand at the City of Washington the ..... day of ....., in the year of our Lord ....., and of the Independence of the United States the .....

[Seal] By the President: .....

By....., Secretary.

.....

Acting Recorder of the General Land Office.

Patent Number: .....

Recorded: Vol. ..... Page .....

[Endorsed]: Filed June 28, 1937. [19]

[Title of District Court and Cause.]

MOTION TO DISMISS PLAINTIFF'S COMPLAINT.

Comes now the defendant, Santa Fe Pacific Railroad Company, a corporation, and respectfully

moves this Honorable Court to dismiss plaintiff's complaint on file herein, and each of the two alleged causes of action therein contained, upon the following grounds and for the following reasons, to-wit:

I.

That the facts alleged in said complaint and in each of the two alleged causes of action therein contained are insufficient to constitute a valid cause of action in equity against the defendant;

II.

As a matter of public record and common knowledge plaintiff, in its own right or as guardian for Walapai[1] Indians, is not, and defendant is, the legal and equitable owner of the unburdened and unqualified fee simple title to all lands in controversy.

[24]

III.

The action is barred by controlling political policies and acts of Congress and the executive which are public records and common knowledge.

IV.

As a matter of public record and common knowledge, the plea of limitation title contained in paragraph 13 of the first cause of action is not supported.

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[1]This spelling will be adopted throughout defendant's pleadings.

Wherefore, defendant prays the judgment of this Court whether it shall further answer, and that it be dismissed with its costs.

CHARLES H. WOODS,
JOYCE COX,
FENNEMORE, CRAIG, ALLEN & BLEDSOE,
By ROSS F. JONES. [25]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT.

Explanatory Preface

Plaintiff asserts two causes of action. Since the grounds of this motion to dismiss, and substantiating authorities, are predominantly the same with respect to both causes of action, the points and subpoints are handled, with minor exceptions, together, without distinction between the two causes of action.

The pleading recites, in general introduction and concluding prayer, that the United States seeks to recover as guardian for the Walapai Indians. Paragraph 2 of the second cause of action alleges the United States, as guardian of said Indians, is the fee simple owner; but paragraph 3 of the first

cause asserts simply that the United States is the owner in fee. We are unable to determine whether distinction is intended, but in our points will take the position that defendant's title is good as against all claims of the United States, either in its own right or as Indian guardian. [26]

In both causes of action the lands are alleged to have been reserved, under the policy of the United States, and excepted from the grant of July 27, 1866. Paragraphs 6, 7, and 12 of the first cause of action allege military and executive orders, 1881 to 1883, creating the Walapai Indian reservation at a time when the Atlantic and Pacific Railroad Company had not completely constructed its line. Paragraph 8 of the second cause of action alleges that some agents between 1852 and 1872, names not given, made reports and performed acts, none of which are described, which had the legal result of making the lands an Indian reservation.

The first cause of action (paragraphs 5 and 9), and the second cause of action (paragraphs 3, 4, 5, and 7), assert that the lands in issue were occupied by the Walapai Indians as their ancestral home. No indication is made that one or the other locality was such ancestral home; and we will assume that it is intended to allege that all territory title to which is in issue in both causes of action was the ancestral home of the Walapai.

Defendant is uncertain as to whether plaintiff's theory is that the lands were excepted from its

grant because of some specific act of reservation or disposal to the Indians (as the recommendation of the military in 1881-1882 and order of President Arthur in 1883, first cause, and of the acts of agents obscurely referred to in paragraph 8, second cause); or whether some act or acts of Congress are relied upon as establishing "public policy." In this motion defendant will show that neither theory, nor any other, can possibly prevail, because the Indians have no rights in conflict with defendant's rights, which attached July 27, 1866, by relation from March 12, 1872, and have been confirmed and reconfirmed by Congress and the executive.

The first cause of action (paragraph 12) alleges twenty years of adverse possession as a basis for plaintiff's claim. No parallel pleading is found in the second cause of action. [27]

Unique to the second cause of action is a plea for an accounting (paragraphs 9 and 10).

Prayer of the complaint is for adjudication that defendant's claims are void and, alternatively, that if they are valid they are subordinate to Indian occupancy right. An accounting, an injunction, and general relief are asked.

The basic theory of this motion is that, to the knowledge of the Court, the complaint states no cause of action. Arizona v. California, 283 U. S. 423, 452; Nev Cal Electric Securities Co. v. Imperial Irrigation District, 85 Fed (2d) 886, 904-5, 906 (certiorari denied, 300 U. S. 662).

There are several matters which will not be disputed, to-wit: the incorporation of defendant alleged in paragraph 2 of the first cause of action, paragraph 1 of the second cause of action; that defendant claims as successor to the Atlantic and Pacific Railroad Company, paragraph 9, first cause, paragraph 5, second cause; that plaintiff's claims are adverse to defendant's claims, paragraphs 9, 11, and 14, first cause, paragraphs 1 and 5, second cause; that the Atlantic and Pacific Railroad Company's map of definite location was filed March 12, 1872, paragraphs 3 and 4, second cause; that patents have issued to lands in the second cause, paragraph 9.

For convenience of the Court, extracts from some of the authorities referred to have been made and attached to the end of the points. (For instance, * appearing after a citation will indicate that extract is attached as Appendix 1, etc.) [28]

Points and Authorities

I.

THE WALAPAI HAVE NEVER BEEN ACCORDED ANY POSSESSORY RIGHT IN THE LANDS INVOLVED UNDER THE POLICY AND LAWS OF THE UNITED STATES (SUPPORTING PARAGRAPHS I AND II OF MOTION).

A. The Walapai have enjoyed and now have

only such legal right as Congress has seen fit to allow them.

Barker v. Harvey, 181 U. S. 481, 482;
United States v. Title Ins. & Trust Co., 265 U. S. 472;
Super v. Work, 3 Fed. (2d) 90; affirmed 271 U. S. 643;
Johnson v. McIntosh, 8 Wheat. 543, 588-9;
Worcester v. Georgia, 6 Pet. 515, 543, 582.

B. The Walapai were disunited bands of non-agricultural, nomadic savages who occupied exclusively no definable territory and no place or places for any great length of time.

1. Garces found them in 1766 subsisting on wild foods and dressing in skins, around modern present reservation (Ibid., 6-11); also from Diamond Creek to the Black Mountains Yabipais Cuercomanches (Coues, On the Trail of a Spanish Pioneer*[1]).

2. The Pedro Font map of 1777 shows Yabipai north of Walapai (17 Works of H. H. Bancroft*[2], photostat attached). Walapai are later in position formerly shown to have been occupied by Yabipai. (18th Annual Report of the Bureau of Ethnology, Arizona maps. Photostat [29] of map and key attached*[3]. Also indicates

Kingman (W.P. 4-6); Yabipai were on the

[1]The letters W. P. are used herein as an abbreviated reference to Walapai Papers, Senate Document 273, 74th Congress, 2nd Session.

no Walapai on lands later becoming reservation.)

3. Seviches were later south of the river from Diamond River to the west end of the present reservation, with gardens at Peach Springs.

   Wheeler, Preliminary Report of Exploration in Nevada and Arizona, 1871, pp. 28, 72, S. Ex. Doc. No. 65, 42d Cong., 2d Sess.;

   Progress Report, Geographical and Geological Explorations and Surveys, West of the 100th Meridian, 1872, p. 37; 1 Coues, supra, 224, f/n*4; Major W. P., 47, 74-5.

4. Yavapai (Yabipai) were at various parts of the country at various times; Sitgreaves in 1851 reported Yabipai in the northern part of the territory, W. P., 7, f/n, 13-15; Whipple reported them about twenty miles south of Truxton in 1854, Senate Executive Document 78, 1855, Whipple Report, 96, 97, 110*5; Captain John Bourke, U. S. A., reported a military expedition against the Yavapai south of the Cerbat Mountains, 1872. The New Mexico Historical Review, 1934, No. 2, April, p. 178; see also Major Price Reports, W. P., 48, 82, 87, 90; Wheeler, Preliminary Report of Exploration in Nevada and Arizona, 1871, 86-89.

5. Apaches were at various parts of the country at various times; Major Price reports Tonto Apaches ranged from [30] northern portion of

Juniper Mountains east to Bill Williams Mountains, W. P., 89, 90.

6. Lieutenant Wheeler in his Preliminary Report, supra, p. 19, S. Ex. Doc. 65, classified Walapai as "that wild, roving breed known as 'Mountain Indians.' Their lawless and migratory life has carried them beyond the notion of anything like order, even among their own people"; Major Price stated Yavapai and Apache bands' habit of living wa similar to that of the Walapai and, "They appear to have no tribal cohesion, each band appearing independently in their hostilities to the settlers," W. P., 90.

7. Scarcity of water, and the hunter life, caused wandering, and conflict over sources of water and food caused constant redistribution of populations. Papers of the Archeological Institute of America, Part I of Final Report of Investigations Among the Indians of the Southwestern United States, carried on mainly in the years from 1880 to 1885, by A. F. Bandelier, pp. 30-33**.

C. Indians such as Walapai may not assert a claim to possessory right.

1. Legal capacity to enjoy corporate rights, never having been created by political recognition, is non- [31] existent. The Cherokee Trust Funds, 117 U. S. 288; The Kansas Indians, 5 Wall. 737, 756-7. Neither by treaty nor otherwise has

any corporate Walapai capacity been recognized.

2. There was no such occupation as would justify recognition of a claim of possessory right. Assiniboine Indian Tribe v. United States, 77 Ct. Cl. 347.

D. No right was recognized in the Walapai.

1. Mexico ceded the land to the United States in 1848 by the treaty of Guadalupe Hidalgo (9 Stat. 922). The Walapai were of the "savage tribes" which under the treaty (Art. XI) the United States undertook to restrain and had the right to remove.

2. The 18th Annual Report of the Bureau of American Ethnology shows the United States assumed title to all lands from the Rio Grande to the Colorado included in defendant's grant.*[3]

3. Senate Document No. 18, 2nd Session, 31st Congress, Vol. 3, 1850-51, p. 34, Report of William Carey Jones on land titles in California: "In the wild or wandering tribes the Spanish law does not recognize any title whatever to the soil."

4. From Report of Lieutenant Sylvester Mowry on Indian tribes of Arizona, Report of Commissioner of Indian [32] Affairs, 1857, H. Ex. Doc. 2, 35th Cong., 1st Sess., pp. 584-93: "The

country occupied by the wild tribes was expressly declared to be public domain." (Under Spanish-Mexican law.)

5. IV Kappler, Indian Affairs, Laws and Treaties, Senate Document 53, 70th Congress (1929), pp. 1170-71:

"In regard to land acquired by the United States from Spain and Mexico, the Indian right of occupancy is not recognized, except where recognized by Spanish and Mexican Governments prior to cession to the United States, or where the United States gave rights to the Indians within these ceded territories by treaty, act of Congress, or executive order, after cession, or by treaty or act of Congress recognized that Indians within these ceded territories possessed such rights of occupancy or possession."

6. Report of the Commissioner of the General Land Office for 1860, S. Ex. Doc. No. 1, 36th Cong., 2d Sess., p. 51:

"In California the Indians have not been recognized as holding any specific tracts of country; but have been collected and transferred to reservations set apart for their protection . . ."

7. Report of the Secretary of the Interior for 1860, S. Ex. Doc. No. 1, 36th Cong., 2d Sess., pp. 34-36:

"With the wild tribes in the heart of the Continent, in Arizona, and in California . . .

we have no treaties whosoever . . ." " . . . the government is free to pursue such a policy as circumstances may render expedient."

8. Report of the Commissioner of Indian Affairs, 1869, House Executive Document No. 1, Part 3, 41st Congress, 2nd Session:

"They (Indians in California) are not in treaty relations with the United States. Negotiations were entered into with many of the tribes in 1851, by commissioners [33] authorized for the purpose, but the treaties then effected were never confirmed, the Senate rejecting them on the ground that the United States, acquiring possession of the territory from Mexico, succeeded to its rights in the soil, and, as that government regarded itself as the absolute and unqualified owner of it, and held that the Indians had no usufructuary or other rights therein which were to be in any manner respected, they, the United States, were under no obligations to treat with the Indians occupying the same for the extinguishment of their title." (p. 457-8.)

Speaking of Arizona: "A large, wild, and apparently untamable body of Indians are embraced in this superintendency . . . As with the Indians in California, so with these, they are not in treaty relations with the United States." (p. 460.)

"The Indian title to lands in the Territory (Arizona) ignored, and difficulties ever increasing between them and a rapidly growing population . . . some provisions should be made . . ." (p. 461.)

9. Report of the Commissioner of Indian Affairs, 1890, H. Ex. Doc. No. 1, Pt. 5, 51st Cong., 2nd Sess., Vol. 2, p. XXX.

". . . the Mexican Government . . . at no time recognized an Indian title within its jurisdiction, except where it had been specially granted. While this Government has recognized that fact, it has never hesitated to provide reservations for the Indians within said States and Territories, as in the case of other Indians, by executive order, or act of Congress, and even by treaty . . .

"The Indian title has been extinguished to all the public domain, except Alaska, and the portion included in one hundred and sixty-two Indian reservations . . ."

10. Testimony of John Collier, Commissioner of Indian Affairs, and Report of the Interior Department, [34] Hearings before the Committee on Indian Affairs, United States Senate, 75th Congress, 1st Session, on S. 1651 and S. 1779*7. No possessory right in Indians was recognized by Spain or Mexico, and it is still the policy of the United States not to create possessory

rights by recognition thereof except by making reservations.

11. Individual Indian rights to well defined areas cultivated by them have been recognized by the United States. Cramer v. United States, 261 U. S. 219; see also 3 L. D. 371; 6 L. D. 341; 32 L. D. 382.

12. Wandering tribes were never recognized as having rights.

Hayt v. United States and Utah Indians, 38 Ct. Cl. 455;

Byrne v. Alas, 74 Cal. 628; 16 Pac. 523;

United States v. Lucero, 1 N. Mex. 422.

E. The covenant in Section 2 of the act of July 27, 1866, by which the United States agreed to "extinguish as rapidly as may be . . ., AND ONLY BY THEIR VOLUNTARY CESSION, the Indian title to all lands . . . acquired in the donation to the road" was not a recognition or creation of any Walapai right.

1. This portion of the act is a contractual covenant, pledge, or stipulation of the United States, running [35] to the grantee.

Buttz v. Northern Pacific Railroad, 119 U. S. 55, 68;

Atlantic and Pacific R. R. Co. v. Mingus, 165 U. S. 413.

2. The clause "and only by their voluntary cession" is a limitation or proviso upon the obligation of the United States.

59 C. J. 1087;

United States v. Morrow, 266 U. S. 531, 534-5;

United States v. Mullendore, 35 Fed. (2d) 78, 82.

3. This part of the act could not give the Walapai any right against the United States.

Gritts v. Fisher, 224 U. S. 640, 648;

Tiger v. Western Investment Co., 221 U. S. 286;

Brader v. James, 246 U. S. 88;

Heckman v. United States, 224 U. S. 413;

Conley v. Ballinger, 216 U. S. 84.

4. The proviso "and only by their voluntary cession" was not a definition of where Indian title existed, or a declaration that it did exist all along the grant. There was no Indian title in Missouri. Report of the Commissioner of the General Land Office for 1860, S. Ex. Doc. 1, 36th Cong., 2d Sess., 51; Indian rights in California were solely in reservations or in Spanish grants presented for confirmation within two years after 1851 (9 Stat. 631), Barker v. Harvey, 181 U. S. 481. The Indians of Arizona without Spanish grants were without right.

Hence, the only Indian right [36] along the line consisted of (a) treaty rights in Indian territory, (b) confirmed Spanish or Mexican grants, and (c) reservations.

5. The clause "and only by their voluntary cession" was an amendment inserted at the behest of the civilized tribes of Indian territory; and the discussion by its sponsor shows that the only Indian rights considered and sought to be protected were in Indian territory, and the words were verbatim from the treaties with said tribes. Congressional Globe, March 1, 1866, 1100 et seq.; March 2, 1866, 1132 et seq.**

F. The affirmative policy of the United States was not to recognize any possessory right in the Walapai, as evidenced (a) by the land and related laws, (b) by its dealing with these Indians, and (c) by its dealing with the railroad land grant.

1. Extension of land and related laws.

(a) New Mexico was created as a territory in 1850 (9 Stat. 446) with police and taxing power and grant of school lands in every township.

(b) The land laws were extended, donations to settlers provided for, and only Spanish and Mexican [37] grants were excepted from the land laws. Act of July 22, 1854 (10 Stat. 308).

(c) On February 24, 1863, Arizona was created from part of New Mexico Territory, and

New Mexico land laws made to apply (12 Stat. 664).

Tumacacori and Calabazas Grant, 16 L. D. 408.

(d) Prescott Land Office was established November 3, 1868, Donaldson, The Public Domain, 173; the Gila office, February 18, 1873 (17 Stat. 465-6); and appropriations were made for surveys from 1865, e. g., 14 Stat. 465, 15 Stat. 116, 15 Stat. 308.

(e) The Surveyor General in 1870 was directed to investigate and report on land titles held under laws and usages of Spain and Mexico (16 Stat. 304).

(f) Proceeds from land sales were appropriated to irrigation projects in 1902 (32 Stat. 388); and in 1912 the number of acres that might be entered was increased to 320 (37 Stat. 132).

(g) The territory exercised the taxing power, Title LVI, 1887 revision, Arizona Statutes; Title LXII, 1901 revision. Counties were [38] authorized to issue bonds, e. g., Coconino (28 Stat. 114), Mohave (35 Stat. 605). The territory protected settler possession on both surveyed and unsurveyed lands. Art. 2222, 1887 revision; Art. 3525, 1901 revision.

(h) The laws effecting Arizona statehood made it clear that Indian Country, exempt from complete sovereignty of the State, was con-

fined to lands occupied by Indians or tribes under right derived from the United States or a prior sovereignty. Section 20 of the Enabling Act of June 20, 1910 (36 Stat. 557); Arizona Constitution, Article XX, Sections Third and Fourth:

Porter v. Hall, 271 Pac. 411;

Langford v. Monteith, 102 U. S. 145;

United States v. McBratney, 104 U. S. 621;

Draper v. United States, 164 U. S. 240.

(i) The Enabling Act of 1910 granted to the State two additional school sections in each township, with provision for indemnity selections for lands lost because of reservations or other appropriations or disposals, and granted for specified purposes 1,350,000 acres additionally. [39]

(j) The lands of Mohave County not in defendant's or other private ownership are now being administered as public lands under the Taylor Grazing Act (48 Stat. 1269, 49 Stat. 1976), Title 43, Sections 315 et seq., U. S. C. See The Grazing Bulletin, January, 1937, map fronting page 11, showing Arizona Grazing District No. 2.

(k) The intent of legislation, and the political policy, to treat all Arizona outside Spanish or Mexican grants and reservations as public domain free of Indian right and open to settlement and grant, are clear from the reports of the Secretary of the Interior,

Commissioner of the General Land Office, and Commissioner of Indian Affairs, transmitted to each Congress by the President. Representative examples are:

(1) Report of the Secretary of the Interior, November 30, 1868 (House Executive Document No. 1, 40th Congress, 3rd Session), at page 72:

"Another cause retarding the prosperity of the Territory is found in the fact that it has been the theatre of Indian hostilities . . . When these difficulties shall have been removed we may look with confidence for a settlement and development of the resources of Arizona. [40]

"The initial point of surveys in the country was established in 1866 at the mouth of the Salt river, or Rio Salinas . . . and 144 miles of exterior lines run, but Indian outbreaks suspended the field work.

"Authority is given by act of 2nd March, 1867, for a district office at Prescott. The quantity of public land to be disposed of is 72,906,304 acres."

(2) Report of the Commissioner of the General Land Office, November 1, 1869 (House Exec. Doc. No. 1, Part 3, 41st Cong., 2nd Sess.), at page 177:

"The area of public lands remaining undisposed of in Arizona, June 30, 1869, was 68,855,890 acres. The United States land office for the disposal of public lands in Arizona is situated at Prescott, where applications should be addressed."

All lands in Arizona slightly exceed 72,000,000 acres.

(3) Report of the Commissioner of the General Land Office, October 27, 1870 (House Exec. Doc. No. 1, Part 4, 41st Cong., 3rd Sess.):

"In regard to right of soil it was settled in the case of the United States vs. Rogers, (4 Howard, 567,) that the Indian tribes are not the owners of the territories occupied by them. These are vacant or unoccupied public lands belonging to the United States." (p. 24.)

" . . . the popular insight detects an underlying infraction of the great law of humanity, of common justice, in the Indian monopoly of the continent." (p. 27.)

"The present determined policy of the general and local governments toward depredatory Indians, however, has recently done much [41] to assist the mining interests and aid the reoccupation of long-deserted mines; so

that the prospects of the Territory in this connection are brighter now than ever before since it became a part of our domain, and so soon as the completion of either or all of the projected interoceanic lines of railway *cross* its limits shall furnish the requisite transportation for its full development, its Indian question will probably be no longer troublesome, . . ." (p. 114.)

"The public-land States and Territories west of the Mississippi have been under the operation of the preemption system in some form almost from their first settlement . . . (Other states and territories and) Arizona will add at least 50,000 more (farms since 7th census), making the grand aggregate of separate rural proprietorships almost 1,700,000 in the States and Territories erected out of the public domain." (p. 180.)

". . . we should rather hail the day when the last squalid remnant of savage life shall have given place to industry and commerce." (p. 181.)

(4) Report of the Secretary of the Interior, 1871 (House Exec. Doc. No. 1, Part 5, 42nd Cong., 2nd Sess.), at page 12:

"The increased value of lands in these Territories (including Arizona), consequent upon the extension of railroads, is rapidly attracting settlers, and it is a matter of the greatest importance to their future prosperity that the private lands should be separated from the public domain at the earliest possible period, to accomplish which result existing legislation is inadequate."

(5) House Executive Document No. 1, Part 5, 42nd Congress, 3rd Session, Report of the Secretary of the Interior, October 31, 1872: [42]

"Measured by any true standard, the present Indian policy . . . has proved a success, inasmuch as for three years it has secured the largest and freest extension and development of our railways and frontier settlements . . . We are assuming, and I think with propriety, that our civilization ought to take the place of their barbarous habits. We therefore claim the right to control the soil which they occupy, and we assume that it is our duty to coerce them, if necessary, into the adoption and practice of our habits and customs." (pp. 3-4.)

"The military occupancy of posts adjacent to the Indian country has not been withdrawn and should not be so long as there is the slightest danger of Indian incursions upon the settlements, or attempts to prevent the extension of new settlements in all legitimate directions . . .

"The policy of confining the wild tribes to smaller reservations is regarded as of the utmost importance; and carried forward to its full extent, will result in restricting them to an area of sufficient extent to furnish them farms for cultivation, and no more. The rapid disappearance of game . . . must operate largely in favor of our efforts to confine the Indians . . . and compel them to abondon their nomadic customs, and establish themselves in permanent homes . . . When the game shall have disappeared, we shall be well forward in the work in hand." (pp. 5-6.)

(6) Report of the Commissioner of the General Land Office, October 26, 1872, Ibid.

"Toward the South the day of deliverance from the fear of Indian hostility is more distant, yet it is not too much to expect that three summers of

peaceful progress will forever put it out of the power of the tribes and bands which at present disturb [43] Colorado, Utah, Arizona, and New-Mexico to claim consideration of the country in any other attitude than as pensioners upon the national bounty. The railroads now under construction, or projected with a reasonable assurance of early completion, will multiply fourfold the striking force of the Army in that section; the little rifts of mining settlement, now found all through the mountains of the southern Territories will have become self-protecting communities; the feeble, wavering line of agricultural occupation, now sensitive to the faintest breath of Indian hostility, will then have grown to be the powerful 'reserve' to lines still more closely advanced upon the last range of the intractable tribes." (p. 397.)

"Hualapais.—These Indians numbering about 1500, inhabit the country near the Colorado River, north of the Mohaves, ranging a considerable distance into the interior. They have been and still are more or less hostile. Those who are quiet and peaceable are, with members of other bands of Indians, be-

ing fed by the Government at Camps McDowell, Beal's Spring, and Date Creek." (p. 446.)

The Indians and the Railroads (at p. 463 et seq.):

"The following are the railroads which pass through Indian reservations, and by which the interests of Indians are, or may be, affected."

At p. 465, Atlantic and Pacific, Indian Territory.

At p. 468, Atlantic and Pacific, Navajo Reservation.

In New Mexico, Camp Verde, Arizona, is the only reservation affected.

"The present attitude of some of the Indians on the proposed line of the same is not very favorable for peaceable operations. At the same time the Government can in no way better strengthen itself . . ." (p. 468.) [44]

O. O. Howard's report of November 7, 1872, of his second visit to Arizona:

"A similar order was issued abolishing McDowell, Date Creek, and Beal Spring as Indian reservations or Indian feeding-posts. I deemed it vastly better for the Indians to have fewer reservations." (p. 559, at 560.)

(7) House Executive Document No. 1, Part 5, 43rd Congress, 1st Session, Re-

port of the Secretary of the Interior, October 31, 1873:

"The Government has a twofold object in confining Indians to reservations: to prevent their encroachments upon white settlers, and to isolate them so far as possible from association with white people." (p. vi.)

"Satisfactory progress has been made within the year in the reduction of the area of existing reservations, in the exchange of reservations lying within the range of advancing settlements and railroad construction for other locations equally desirable for all purposes of Indian occupancy, as well as in bringing tribes upon reservations for the first time . . ." (p. vii.)

(8) Report of the Commissioner of the General Land Office for October 20, 1873, Ibid.

At p. 174. Surveyed during fiscal year ending June 30, 1873:

T 20 N	R 22 W	5,759.05	acres	12,800	unsurveyed	mt.	land	
23 N	18 W	22,980.30	"	—				
18 N	5 W	23,004.96	"	—				
18 N	6 W	6,400	"	16,640	"	"	"	

[45]

At p. 286. Estimated quantity embraced in the limits of the Atlantic and Pacific grant, 42,000,000.

Estimated quantity which the company will receive from the grant, 40,000,000.

At p. 299. Statement showing the time when the various railroad rights attach to the lands granted, so far as at present determined.

At p. 301. "Atlantic and Pacific . . . From that point (eastern boundary of New Mexico) to the eastern boundary of California, March 12, 1872."

(9) Report of the Commissioner of Indian Affairs, November 1, 1873, Ibid.

"The comparative weakness of the whites made it expedient, in our early history, to deal with the wild Indian tribes as with powers capable of self-protection and fulfilling treaty obligations, and so a kind of fiction and absurdity has come into all our Indian relations. . . . So far, and as rapidly as possible, all recognition of Indians in any other relation than strictly as subjects of the Government should cease." (p. 371.)

Report of J. A. Tormer (Tonner), Agent at Colorado Reserve, August 30, 1873:

"Since my last annual report the Hualpais have been placed under my charge. This people range through the country north and east of the Majaves . . . It is my intention to remove them to this reservation in October next, where they can be fed with less expense to the Government." (p. 652.)

(10) House Executive Document No. 1, Part 5, 43rd Congress, 2nd Session, Surveyor-General's report, August 13, 1874: [46]

"In the northwest there has been an extension of the fourth and sixth standards north, and exteriors therefrom for the accommodation of miners, and also subdivision of the township covering the town of Cerbat, situated in one of the richest mineral regions west of the Rocky Mountains." (pp. 180-81.)

At p. 181. Indian reservations—necessity for survey of exterior boundaries. Miners went on White Mountain and paid for development, surveying, paying government for claims, before they discovered they were on reserved lands.

At pp. 181-2. Development of territory, mining, cattle raising, agriculture, due to Indian peace.

At p. 186. Surveys in year ending June 30, 1874. T. 22 N., R. 17 W., 23,-009.00 acres public land.

Report of the Commissioner of Indian Affairs, November 1, 1874:

At p. 371. Arrival of Wulapai at agency.

At p. 597. Tonner report, September 25, 1874.

At p. 442 et seq. Schedule showing the names of Indian reservations in the United States. No reservation for Walapai other than Colorado River.

(11) House Executive Document No. 1, Part 5, Vol. 1, 46th Congress, 2nd Session, Report of the Commissioner of Indian Affairs, November 1, 1879.

At p. 324. "Schedule showing the names of Indian Reservations in the United States, agencies, . . . tribes occupying or belonging to the reservation, . . ."

"Colorado River . . Hwualapai . . "

[47]

At beginning of this report (p. 69) is a map of Indian reservations. None is shown in any of the lands here involved.

(12) House Executive Document No. 1, Part 5, 48th Congress, 1st Session, Vol. 1, report of the Secretary of the Interior, 1883:

At p. 214. Surveyor-General's report: "Towns have been laid out and are prospering at Holbrook, Williams, Ash Fork, Peach Springs, and Kingman, and ranchmen . . . are making inquiries and prospecting for the selection and stocking of grazing lands in that section."

(1) The Act of 1918 ratified the results of history, and made it impossible for the executive or judicial branches to extend any Indian reservation, by forbidding further Indian reservations in Arizona. The purpose of this law was to protect Arizona's resources from the mortmain of Indian reservations, and to preserve her taxable wealth and her power to govern. 40 Stat. 570, Title 25, U. S. C. A., Sec. 211; Congressional Record, March 28, 1918, pp. 4194-5*". See also Session Laws, 1935, p. 183, prohibiting expenditures for acquisition of lands outside reservations for Indians in Arizona. [48]

2. Dealings with the Indians.

(a) In 1864, appropriation was made to assist the Indians to locate in "permanent abodes, and to sustain themselves by the pursuits of civilized life" (13 Stat. 180); and in that year Indian Superintendent Poston recommended the establishment of a reser-

vation for the Walapai and others on the lower Colorado. W. P., 33.

(b) Congress established this lower Colorado reservation in 1865. 13 Stat. 569; see also W. P., 36.

(c) This "reservation" was a tract of land "reserved from sale" for a public purpose, an exception made to the application of the otherwise generally applicable public land laws. United States v. Celestine, 215 U. S. 278, 285.

(d) In 1865 and subsequent years appropriations were made for collecting and locating Arizona Indians and civilizing them, e. g., 14 Stat. 512, 514-15; 15 Stat. 219, 222; 16 Stat. 36, 357, 566; 17 Stat. 187, 188, 459.

(e) During the hostilities, 1865-1869, soldiers were sent to protect white settlers, not Indians from the whites. W. P., 41-92. [49]

(f) In 1871 Vincent Colyer ordered the Walapai who were around Beale Springs to be fed there on a temporary reservation, until it could be determined what to do with them (W. P., 93).

(g) The Walapai were by orders of officers of the Interior Department taken to their reservation on the lower Colorado in April, 1874, but after a year there, ran away (W. P., 96-114), continuing their wandering life (W. P., 115-128, 139-46).

(h) Subject to presidential approval, General Willcox ordered a military reservation set aside, July 8, 1881 (W. P., 135). Presidential approval was not given for a military reservation; but on January 4, 1883, an Indian reservation was ordered set aside (W. P., 146).

(i) The reservation was not suitable for the Indians, or much used by them (W. P., 147-71, 201-3, 204, 208).

(j) No Indian reservation was ever made for Walapai except the lower Colorado reserve in 1865, the small Beale Springs feeding post in 1871, and the reservation of January 4, 1883. House Executive Document No. 1, Part 5, Vol. 1, 42nd Congress, 3rd [50] Session (1872), The Indians and the Railroads (at 463 et seq.), lists the only reservations affected by or affecting the Atlantic and Pacific as Indian Territory, a Navajo reservation, and Camp Verde reservation (see 465, 468). General Howard had abolished Beale Springs as a reservation or feeding post, deeming it "vastly better for the Indians to have fewer reservations." (p. 559, at 560.)

House Executive Document No. 1, Part 5, Vol. 1, 43rd Congress, 1st Session. The plan was to move the Walapai to the lower Colorado reservation in October, 1873 (see Tonner report, at p. 652).

House Executive Document No. 1, Part 5, 47th Congress, 1st Session (1881), Vol. 1, page 1. Indian office map of Indian reservations shows none such as is claimed in this suit. At pp. 36-7 Walapai history is reviewed showing nothing such as plaintiff claims. A table at p. 319 shows all Indian reservations. The Walapai are listed as belonging to the lower Colorado reserve. Similar table appears in House Executive Document No. 1, Part 5, 47th Congress, 2nd Session, Vol. 2 (1882), at 362. [51]

(k) Dealings with Indians by the Interior Department under direction of the President, not contrary to law, are authorized. Act of July 9, 1832 (4 Stat. 564); Act of March 3, 1849 (9 Stat. 395); Section 2, Title 25, U. S. C. A.; but since 1871 dealings by treaty have been forbidden. 16 Stat. 544, 566; Section 71, Title 25, U. S. C. A.

(l) The general allotment act of February 8, 1887 (24 Stat. 389), recognized Indians had rights only inside reservations, could procure rights outside reservations only by purchase.

(m) In addition to dealing with Indians directly, Congress and the Interior Department by their policies with respect to land and settlers (outlined above), and with respect to the Atlantic and Pacific and defendant (outlined below), manifested their

affirmative policy that Indians had no recognized soil right inconsistent with defendant's ownership.

3. Dealings with railroad lands.

(a) The Act of July 27, 1866, was a present grant of the lands in issue, which became effective by [52] relation to the date of the act when the map of definite location, filed and accepted March 12, 1872, as alleged by plaintiff, identified them.

United States v. Southern Pacific R. R. Co., 146 U. S. 570, 593;

16 Ops. Atty. Gen., 572;

17 Ibid., 251;

Buttz v. Northern Pacific Railroad, 119 U. S. 55;

Lucero v. Atlantic & Pac. R. R. Co., 32 L. D. 85.

(b) The Commissioner of the General Land Office confirmed the effect of the grant by withdrawing from other disposition the odd-numbered sections within the grant limits on May 17, 1872. Statement Showing Land Grants Made by Congress, Government Printing Office, 1915, 18; see also 7 L. D. 405.

(c) The surveying, grading, construction, and acceptance of the Atlantic and Pacific was reported by the President to Congress through the medium of Interior Department reports, as developments occurred.

(1) House Executive Document No. 1 Part 5, 42nd Congress, 3rd Session, 1872. Commissioner of the General Land Office reports filing of Atlantic and Pacific maps indicating the line of the road "through New Mexico and Arizona to the Colorado River at a point near Fort Mohave." (p. 31.)

[53]

(2) House Executive Document No. 1, Part 5, 43rd Congress, 1st Session, 1873, at 301. Rights of the Atlantic and Pacific attached to the lands granted in Arizona on March 12, 1872. This notation is made in reports of subsequent years, e. g., 1879 report at 629, 1880 report at 639, 1881 report at 182.

(3) House Executive Document No. 1, Part 5, 46th Congress, 3rd Session, 1880, at 46. The Atlantic and Pacific "has been revitalized, and has begun the construction of its road west of Albuquerque, N. Mex." (Report of Public Lands Commission.) See also Report of the Commissioner of the General Land Office, at 434, and of Surveyor-General of New Mexico, at 1030.

(4) House Executive Document No. 1, Part 5, 47th Congress, 1st Session, 1881, at xvi, xvii, 125. Complete con-

struction across New Mexico and into northeastern Arizona reported.

(5) House Executive Document No. 1, Part 5, Vol. 1, 47th Congress, 2nd Session, 1882. Commissioner [54] of Railroads reports inspection as far as Canyon Diablo, and construction 96 miles beyond to a point 157 miles from the Needles. Also acceptance by the President of 200 miles, and appointment of commissioners to examine 200 miles more.

(6) House Executive Document No. 1, Part 5, 48th Congress, 1st Session, Vol. 1, 1883, Surveyor-General's report. "During the fiscal year this road has been extended from the Canon Diablo to the Colorado River, a distance of 263 miles." (p. 214.) See also Report of Commissioner of Railroads, 505-7, and Appendix 1, p. 511, at 529-32, showing grant lands available.

(d) The President, through transmission of Interior Department reports, regularly reported to Congress that the Atlantic and Pacific rights, vested in 1872, could not be forfeited except by act of Congress.

(1) House Executive Document No. 1, Part 5, 44th Congress, 1st Session, at 72: For forfeiture an act of Congress or judicial declaration is necessary. [55]

(2) House Executive Document No. 1, Part 5, 45th Congress, 2nd Session (1877). The report of the Commissioner of the General Land Office comments on railroad land grants subject to forfeiture by act of Congress or judicial proceedings, and recommends legislation extending time (pp. 12-13). These comments are repeated in 1878 and 1879. Full report was made on the subject in 1880, House Executive Document No. 1, Part 5, 46th Congress, 3rd Session, at 515; and the Secretary of the Interior and Commissioner of the General Land Office renewed the subject in 1882, House Executive Document No. 1, Part 5, Vol. 1, 47th Congress, 2nd Session, at xxxii and 10. House Executive Document No. 1, Part 5, 48th Congress, 1st Session, Vol. 1, 1883, the Secretary of the Interior reported "Congress alone can relieve the settler by declaring the lands forfeited" (p. xxxiv), and the Commissioner of the General Land Office made it [56] clear that no executive power of forfeiture was possessed or had been exercised (pp. 14-23).

(e) The act of 1876 (19 Stat. 121), and "An act to provide for taxation of railroad grant lands, and for other purposes," ap-

proved July 10, 1886 (24 Stat. 143), required railroads to pay surveying costs; and the act of 1910 (36 Stat. 834), required their payment before survey, to enable completion of land-grant adjustments and render lands more speedily subject to taxation. In proceeding under the act of 1887 (24 Stat. 556), to adjust defendant's land grant, and under the other acts cited, the Secretary of the Interior in demanding survey moneys and making surveys was adjudicating and confirming defendant's title pursuant to Congressional policy.

Santa Fe Pacific R. R. Co. v. Lane,
244 U. S. 492, 496;

Senate Report 609, 61st Congress, 2nd Session. *[9] (a)

Bates & Guild Co. v. Payne,
194 U. S. 106.

(f) The issuance of patents to lands in the second cause of action, as alleged by plaintiff, was upon decision of duly authorized executive department that defendant's title was perfect; every presumption is [57] indulged in favor of the correctness of its actions; and they can be overturned only for fraud or imposition, which are not alleged.

Diamond Coal Co. v. United States,
233 U. S. 236, 239;

United States v. San Jacinto Tin Co.,
125 U. S. 273, 300;

Maxwell Land-Grant Case,
121 U. S. 325, 381-2;
United States v. Stinson,
197 U. S. 200, 204-5;
United States v. Clarke,
200 U. S. 601, 608.

(g) Congress has confirmed defendant's title to lands in Arizona:

(1) By the act of 1871 (17 Stat. 9), permitting mortgage and restricting mortgagees' rights to lands opposite completed sections at time of foreclosure.

(2) By the act of July 6, 1886 (24 Stat. 123), forfeiting the grant opposite UNCOMPLETED SECTIONS, and the act of July 10, 1886 (24 Stat. 143), providing for payment of surveying costs and for taxation after survey of lands opposite COMPLETED SECTIONS.

(3) By the act of 1897 (29 Stat. 622), authorizing foreclosure sale and purchase, requiring quitclaim of lands opposite unconstructed sections. [58]

(4) By the act of 1902 (32 Stat. 405), giving defendant the right to lease or sell to The Atchison, Topeka and Santa Fe Railway Company but stipulating for retention of the right of the United States to land-grant rate advantages and that the land should "remain as

now" subject to Territorial and later to State taxation.

(5) By taking for the United States benefits in the nature of land-grant rate reductions.

Act of March 3, 1875 (18 Stat. 453, Title 10, Sec. 1375, U. S. C., troops and property);

Act of July 28, 1916 (39 Stat. 430, subdivision 30, Title 39, Sec. 552, U. S. C., mail).

See regulations covering transportation over land-grant and bonded railroads, and the settlement of accounts for such service, Government Printing Office, 1899, and subsequent issues of such regulations, for maps and tables showing the Atlantic and Pacific line as subject to deductions.

(h) Railroad right and Indian no-right outside reservations was recognized by the act of March 4, 1913 (39 Stat. 1007), "An act for the relief of Indians occupying railroad lands in New Mexico, Arizona, or California"; by the act of June 22, 1874 (18 Stat. 194), "An act for the relief of [59] settlers on railroad lands," and its extension in 1890 (26 Stat. 369); by the act of August 4, 1922 (42 Stat. 829), "An act to permit adjustment of conflicting claims to certain lands in Mohave County."

(i) Both Congress and the executive have recognized that the grant did not attach to odd-numbered sections in reservations created prior to the filing of map of definite location, but did attach to lands over which reservations were established subsequent to the filing of such map.

Act of April 21, 1904 (33 Stat. 211);

Atlantic & Pacific R. R. Co. v. Willard, 17 L. D. 554;

Regulations under act of April 21, 1904, 34 L. D. 666;

Santa Fe Pacific R. R. Co., 35 L. D. 83 (Zuni and Navajo reserves);

Santa Fe Pacific R. R .Co., 41 L. D. 96 (Moqui reserve);

House Report 1446, 68th Congress, 2nd Session, W. P., 206-7;

Act of February 20, 1925 (43 Stat. 954).

(j) From March 12, 1872, to the inception of this lawsuit the United States has treated the Atlantic and Pacific Railroad as owner of the odd-numbered sections in the Walapai reservation.

Act of April 21, 1904 (33 Stat. 211);

Extract from Report of Board of Indian Commissioners, 1924, W. P., 204-5;

House Report 1446, 68th Congress, 2nd Session, W. P., 206-7;

Act of February 20, 1925 (43 Stat. 954), W. P., 206;

Statement of D. H. Watson to Senate, May 22, 1931, W. P., 283, at 285;

Indian Commissioner Scattergood's statement to Senate Committee, May 22, 1931, W. P., 303;

Opinion of Interior Department, E. C. Finney, September 16, 1931, [60] W. P., 319;

Opinion of Assistant Attorney General Richardson, November 12, 1931, W. P., 325.

The agreement referred to in Commissioner Scattergood's statement was effectuated in part by the stipulation filed in this Court in United States of America, Plaintiff, v. The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, No. L-388 Prescott, dated July 31, 1931, upon which this Court entered judgment in said cause on July 7, 1931, as follows: "and said The Atchison, Topeka and Santa Fe Railway Company and/or Santa Fe Pacific Railroad Company, a corporation organized and existing under the laws of the United States, all of the capital stock of which, except directors' qualifying shares, is owned by said The Atchison, Topeka and Santa Fe Railway Company, having reached a satisfactory understanding

and agreement with the United States of America for the use and benefit of the Walapai or Hualapai Indians pursuant to authority contained in the Act of Congress of February 20, 1925, (43 Stat. 954) entitled 'An Act to provide for exchanges of Government and privately owned lands in the Walapai Indian Reservation, Arizona,' for the exchange and consolidation of large areas of lands of the respective parties, including the lands and waters concerned in this action, lying within the Walapai or Hualapai Indian Reservation in the State of Arizona, the plaintiff and the defendant in the action above numbered and entitled do hereby stipulate, subject to the approval of the Court, that judgment shall be rendered for the Plaintiff in this cause fixing the respective rights and titles of the parties as follows."

G. The non-recognition of any Walapai right, conclusively shown by acts of Congress and the executive, is a political fact which the judicial power may not disregard.

Shoshone Tribe v. United States,
299 U. S. 476, 495-6;
Super v. Work, 3 Fed. (2d) 90, 91, affirmed,
271 U. S. 643;

Barker v. Harvey, 181 U. S. 481; [61]
United States v. Title Ins. Co.,
265 U. S. 472;
Klamath Indians v. United States,
296 U. S. 244;
Sioux Indians v. United States,
277 U. S. 424, 436;
Beecher v. Wetherby, 95 U. S. 517, 525;
Conley v. Ballinger, 216 U. S. 84, 90. [62]

II.

ANY WALAPAI RIGHT OR TITLE HAS BEEN EXTINGUISHED (SUPPORTING PARAGRAPHS I AND II OF MOTION).

A. Extinction of Indian right may be by simple fiat of the sovereign.

Spalding v. Chandler, 160 U. S. 394, 407;
Missouri, Kansas & Texas Ry. Co. v. Roberts,
152 U. S. 114, 118;
Kindred v. Union Pacific R. R. Co., 225 U. S.
582;
Nadeau v. Union Pacific R. R. Co., 253 U. S.
442, 446;
Conley v. Ballinger, 216 U. S. 84.

B. Any Walapai title or right was extinguished prior to July 27, 1866.

1. The acts of Congress which threw all the territory open to settlement by extending the land laws and protecting settlers by the military

operated as a withdrawal of any recognition of Indian right.

United States v. Repentigny, 5 Wall. 211, 267-8;

Johnson v. McIntosh, 8 Wheat. 543, 587, 588-90;

See also citations under point I, subsection D;

Report of the Secretary of the Interior for 1860, S. Ex. Doc. 1, 36th Cong., 2nd Sess., p. 34.

"The government is free to pursue such a policy as circumstances may render expedient, . . . " ". . . impressing upon them the necessity of maintaining friendly relations with the whites, and assuring them that acts of violence and rapine will be sure to draw upon them severe chastisement."

2. All subsequent history of ignoring Indian claim and confirming railroad and settler rights confirms the conclusion that any recognition of Indian claim was withdrawn. [63]

Tiger v. Western Investment Co., 221 U. S. 286, 306;

United States v. Jackson, 280 U. S. 183, 196-7;

United States v. Union Pac. R. R. Co., 148 U. S. 562, 572;

Swayne and Hoyt, Ltd., et al. v. United States, 300 U. S. 297, 301;

Northern Pac. Ry. Co. v. Wismer, 246 U. S. 283, 287-8;

3. Indian Superintendent Poston in 1864 agreed with the Walapai that he would recommend for them a reservation; they agreed to go upon it; Congress set aside the reservation recommended in 1865.

13 Stat. 559;

Walapai Papers, p. 33;

Congressional Globe, March 2, 1865.*[10]

4. The reservation was an exemption of certain lands, devoted to a public purpose, from the land laws, which were applicable to the balance of the lands of Arizona.

United States v. Celestine, 215 U. S. 278, 285.

5. Removal of the Walapai was the plan of the Indian Department, though consummation was delayed.

Report of the Commissioner of Indian Affairs, 1866, in H. Ex. Doc. No. 1, 39th Cong., 2nd Sess., p. 27.

6. Surveying was being undertaken and settlers were coming in to the territory prior to 1866.

Report of the Commissioner of the General Land Office, 1866, in H. Ex. Doc. No. 1, 39th Cong., 2nd Sess., at p. 371.

C. Any possessory right of the Walapai was extinguished prior to March 12, 1872.

1. There was continuous warfare against the Walapai in 1865-1869, W. P., 41-92. [64]

2. Any Indian claims were ignored.
   Report of the Commissioner of Indian Affairs, 1869, in H. Ex. Doc. No. 1, Part 3, 41st Cong., 2nd Sess., 461.

3. Appropriations for public surveys were continued and two land offices were opened.

4. Mr. Vincent Colyer, after the close of hostilities, ordered the Indians to be fed on a small temporary reservation at Beale Springs, being unable to do more until it should be determined what section of the country would be desired by white people. W. P., 93. Mr. Colyer apparently had overlooked the fact that Congress had selected a reservation for the Walapai. The policy to remove the Walapai was delayed until 1874. W. P., 96.

D. Congressional and executive acts since March 12, 1872, were of such character as to extinguish any Walapai right inconsistent with defendants' title not theretofore extinguished.

1. The history reviewed under point I is referred to.

2. The executive reservation for defendant of all lands in issue on May 17, 1872, was evidence

of withdrawal of any recognition of Indian claims; for such action was predicated upon prior status of all the lands as public domain, and [65] subsequent status of even-numbered sections as public domain, of odd-numbered sections as railroad property.

E. The Walapai have surrendered any claims they may once have asserted inconsistent with defendant's title.

1. The agreement of the Indians with Poston in 1864 was a cession of claim, if cession were necessary, because thereafter the political departments of the Government considered the Walapai as without any right to the lands here in dispute.

   Buttz v. Northern Pacific Railroad, 119 U. S. 55, 69-70.

2. Even though the Indians' claim was not recognized, its relinquishment was sufficient to bar their further asserting it.

   Ute Indians v. United States, 45 Ct. Cl. 440.

3. Long acquiescence by the Indians in the railroad and settler rights constitutes an abandonment of their claims, if any.

   Johnson v. McIntosh, 8 Wheat. 543, 590;
   United States v. Cook, 19 Wall. 591, 593;
   Beecher v. Wetherby, 95 U. S. 517, 526;
   Williams v. City of Chicago, 242 U. S. 434, 437.

F. The Walapai have received from Congress amounts deemed by it appropriate and just. W. P., 357-9.

G. Any rights the Walapai may have had were lost by their failure to present claims to [66] the Court of Private Land Claims created by the act of March 3, 1891.

1. Prior to the act of 1891 Congress had reserved to itself decision as to what Mexican and Spanish claims were valid.

   Tumacacori and Calabazas Grant, 16 L. D. 408;

   Astiazaran v. Santa Rita Mining Co., 148 U. S. 80.

2. The act of 1891 required on penalty of forfeiture that imperfect claims be presented. There could be no more imperfect claim than Indian claim based on occupancy; and failure to present any Walapai claims that may have existed has completely barred their assertion.

   Minturn v. Brower, 24 Cal. 644, 663;

   Botiller v. Dominguez, 130 U. S. 238;

   Barker v. Harvey, 181 U. S. 481, 490-93;

   United States v. Title Insurance and Trust Co., 265 U. S. 472.

H. Upon extinction of the Walapai right, if any they ever had, defendant's title became perfect regardless of time or method of extinction; for defendant's least possible right was the fee burdened

by Indian occupancy; and when the United States removed the occupancy burden, neither Indians, defendant, nor this Court could question the means; and defendant's fee became the only interest in the land.

Buttz v. Northern Pacific Railroad, 119 U. S. 55;

Klamath Indians v. United States, 296 U. S. 244;

Sioux Indians v. United States, 277 U. S. 424, 436;

Beecher v. Wetherby, 95 U. S. 517, 525;

Conley v. Ballinger, 216 U. S. 84, 90;

Shoshone Tribe v. United States, 299 U. S. 476, 495-6. [67]

III.

DEFENDANT'S TITLE HAS BEEN VESTED AND CONFIRMED BY THE POLITICAL AUTHORITIES IN SUCH MANNER THAT IT IS BEYOND CHALLENGE (SUPPORTING PARAGRAPHS II, III, AND IV OF MOTION).

A. The plaintiff has, by vesting title in defendant, precluded attack on that title.

1. The history and authorities reviewed under point I are here referred to.

2. The Department of the Interior has conclusively determined that the lands in issue were included in the grant, and that no facts, or proper applications of law to facts, excepted the lands from the grant.

(a) The Department of the Interior was required, in adjusting the Atlantic and Pacific grant, to determine all questions of fact and law necessary in identifying defendant's lands, and demand the cost of surveying the lands so adjudicated as belonging to defendant. Act of March 3, 1887 (24 Stat. 556), Act of June 25, 1910 (36 Stat. 834). Santa Fe Pacific R. R. Co. v. Lane, 244 U.S. 492, 496. See also *9(a).

(b) The Department of the Interior's determination of the defendant's ownership of the lands in the [68] first cause of action (see ante, pp. 35-6) is conclusive, because (a) it was within the jurisdiction of the department, (b) it involved conclusive fact determinations, discretionary political determinations not reviewable by courts, and determinations of mixed questions of fact, executive discretion, and law, and (c) no suggestion of lack of jurisdiction, inadvertence, or fraud is pleaded or historically present.

Bates & Guild Co. v. Payne, 194 U. S. 106, 108-9;

Lane v. Watts, 234 U. S. 525;

Shaw v. Kellogg, 170 U. S. 312;

Knight v. United States Land Assn., 142 U. S. 161, 177-8, 181;

Lane v. Hoglund, 244 U. S. 174.

(c) The same considerations render final the adjudications evidenced by patent in the second cause of action.

Burke v. Southern Pacific R. R. Co., 234 U. S. 669;

Burfenning v. Chicago, St. P., M. & O. Ry. Co., 163 U. S. 321;

Germania Iron Co. v. United States, 165 U. S. 379;

Diamond Coal Co. v. United States, 233 U. S. 236;

McCaskill Co. v. United States, 216 U. S. 504.

3. By disposing of all the lands in the issue to defendant for a price, and by repeatedly confirming in defendant both the rights and the burdens of its grant, Congress and the executive have vested [69] title to the lands in defendant in such a way that Congress itself (although it has not attempted any such thing, and its latest action, in 1925, confirms defendant's title), or any court, can not divest such title.

United States v. Creek Nation, 295 U. S. 103, 110;

Shoshone Tribe v. United States, 299 U. S. 476, 495-6;

Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 680;

United States v. Northern Pac. Ry. Co., 256 U. S. 51, 64;

Payne v. Central Pacific R. R. Co., 255 U. S. 228, 236-7;
Sinking Fund Cases, 99 U. S. 700, 719;
Perry v. United States, 294 U. S. 330.

B. The lands of the second cause of action were not reserved for the Walapai by any acts performed by government agents between 1852 and 1872.

1. The expedition of Captain Sitgreaves was directed by the Corps of Topographical Engineers to study the geography of the region. Senate Executive Document No. 59, 32nd Congress, 1852-3, Vol. 10, page 4.

2. The Pacific Railroad Surveys (see Act of March 3, 1853, Sec. 10, 10 Stat. 214, at 219) were "to ascertain the most practicable and economical route for a railroad from the Mississippi River to the Pacific Ocean."

3. Among Lieutenant Whipple's instructions appeared the following: "Great attention will be given to those collateral [70] branches of science which more or less directly affect the solution of the question of location for the proposed railway: the nature of the rocks and soils, the means of obtaining water . . .; the products of the country . . .; its population and resources; its supply of timber and other materials . . .; the location, character, habits, tradition, and language of the Indian tribes."

House Executive Document No. 129, 33rd Congress, 1st Session, 1853-4, Vol. 18, Part 2, page 6. He had and presumed to exercise no authority to set aside any reservations for Indians; never located Walapai.

4. S. F. Beale in surveying a wagon road from Fort Defiance to the Colorado River had no authority and did not purport to set aside a reservation. House Executive Document 124, 35th Congress, 1st Session. He never mentioned Walapai.

5. Ives saw some Indians on Diamond Creek he thought to be Walapai; but there is no suggestion that he had or purported to exercise authority to set aside a reservation for them. Ives, Report Upon the Colorado River of the West, explorations in 1857 and 1858. See W. P., 15 et seq. [71]

6. Lieutenant George M. Wheeler's expedition was for the "main object" of exploring to "obtain correct topographical knowledge of the country . . . and to prepare accurate maps of that section. In making this the main object, it is at the same time intended that you ascertain as far as practicable everything relating to the physical features of the country, the numbers, habits, and disposition of the Indians who may live in this section, the selection of such sites as may be of use for future military operations or occupation, and the facilities offered for mak-

ing rail or common roads, to meet the wants of those who at some future period may occupy or traverse this part of our territory." Preliminary Report of Explorations in Nevada and Arizona, 1871, supra, page 3. No authority was given or purported to be exercised of setting aside any reservation for Indians. Wheeler's activities were pursuant to the policy of controlling the country for white settlement. See history heretofore given, particularly pages 17-19.

7. Vincent Colyer's action in 1871 does not establish, but negatives, recognition of any Walapai right. W. P., 93. [72]

8. Walapai Papers, styled by plaintiff's attorney in the oral argument on defendant's Motion for Further Particulars as the Government's written evidence in this case, does not support but negatives the pleading that a reservation was made for the Walapai.

9. The whole summary of history heretofore made negatives the pleading.

C. The executive order of January 4, 1883, and the earlier unconfirmed military order of 1881 did not operate to reserve for Indian use the odd-numbered sections in the Walapai Indian Reservation, or affect defendant's vested title thereto.

1. Until Congress passed the act of 1886 forfeiting the grant opposite unconstructed portions of the line, Congress was expecting the railroad

to be built, the Atlantic and Pacific Railroad Company had the right to build it, and its title remained vested and became unconditional as respects all lands opposite constructed and accepted portions.

United States v. Southern Pac. R. R. Co., 146 U. S. 570, 595, 604-5;
16 Ops. Atty. Gen., 572;
17 Ops. Atty. Gen., 251;
McGrath v. Atlantic &. Pac. R. R. Co., 1 L. D. 328;
Schulenberg v. Harriman, 21 Wall. 44, 66, 63-4;
Missouri, Kansas & Texas Ry. Co. v. Kansas Pacific Ry Co., 97 U. S., 491, 496-8;
St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. 1, 6;
Stark v. Starrs, 6 Wall. 402, 418. [73]

2. The title to the lands having passed to defenddant on March 12, 1872, and remaining there, and having been both by operation of law and by act of the Interior Department reserved to defendant, and Congress never having forfeited, the executive acts purporting to set aside the Walapai Indian Reservation could not and did not affect defendant's title.

Van Wyck v. Knevals, 106 U. S. 360, 367;
Buttz v. Northern Pacific Railroad, 119 U. S. 55, 72;
Tumacacori and Calabazas Grant, 16 L. D. 408, 420-22;

Wilcox v. McConnell, 13 Pet. 498, 513;
Leavenworth, Lawrence & Galveston R. R. Co., v. United States, 92 U. S. 733, 745;
Santa Fe Pacific R. R. Co. v. Lane, 244 U. S. 492;
United States v. Minnesota, 270 U. S. 181, 209-10.

D. Plaintiff does not have title by limitation to the lands of the first cause of action.

1. A twenty-year period of limitation is not provided by any statute of Arizona or of the United States.

2. Up until the inception of this suit it has heretofore been shown that as a matter of public record the United States and the Department of the Interior fully recognized defendant's title; hence, such possession as may be proved was not adverse and is not presumed adverse.

Montana Lumber Co. v. United States, 196 U. S. 573;
2 Tiffany on Real Property, 2nd Ed., Sections 502, 506; [74]
United States v. Board of National Missions, 37 Fed. (2d) 272, 274;
Collins v. Riley, 104 U. S. 322;
Ricard v. Williams, 7 Wheat. 59, 107-8.

3. There is no basis for presumption of a lost grant since the history of the whole title is clear, and there is no basis for presuming a grant from the United States to the Indians or

a grant from the defendant or its predecessor in title to the Indians or to plaintiff.

Ricard v. Williams, 7 Wheat. 59, 109-10;
Fletcher v. Fuller, 120 U. S. 534, 550;
United States v. Chavez, 175 U. S. 509,521.

4. There has been no continuous adverse possession in fact.

Walapai Papers, pp. 208, 288;
2 Tiffany on Real Property, 2nd Ed., Sections 506, 502.

5. The United States having always admitted defendant's title, the Indians were and are incapable of taking a different position.

Heckman v. United States, 224 U. S. 413, 444-5.

6. Defendant was justified in relying upon the United States' concession of its title.

Curtner v. United States, 149 U. S. 662;
United States v. New Orleans Pacific R. R. Co., 248 U. S. 507.

E. The United States is barred by the equities.

1. The United States, invoking the aid of equity, subjects itself to the application of equitable principles. [75]

The Western Maid, 257 U. S. 419;
United States v. Stinson, 197 U. S. 200, 203-4;
Brent v. Bank, 10 Pet. 569, 614;
Pan American Co. v. United States, 273 U. S. 456, 506;
Iowa v. Carr, 191 Fed. 257, 266;
Walker v. United States, 139 Fed. 409, 413.

2. The United States is estopped. Congress itself, and the executive, pursuant to law, having vested defendant's title, required it to pay taxes and cost of surveying, and carry government freight at land-grant rates, have estopped plaintiff from questioning defendant's title.

United States v. Winona and St. P. R. R. Co., 165 U. S. 463, 474-5;

United States v. Grand Rapids R. R. Co., 154 Fed. 131, 136-8; affirmed, 165 Fed. 297, 303-4;

United States v. Creek Nation, 295 U. S. 103;

Shoshone Tribe v. United States, 299 U. S. 476;

United States v. Chicago, M. & St. P. Ry. Co., 218 U. S. 233.

3. Defendant is a bona-fide purchaser for value under general equity rules, having purchased under the assurance of the acts of the executive and acts of Congress, and being entitled to rely on the knowledge and good faith of Congress.

United States v. Des Moines, etc., Co., 142 U. S. 510;

United States v. Detroit Lumber Co., 200 U. S. 321, 334, 335, 339;

United States v. Winona and St. P. R. R. Co., 165 U. S. 463, 478-9;

United States v. Koleno, 226 Fed. 180, 183;

United States v. St. Paul, M. & M. Ry. Co., 225 Fed. 27, 31.

For purchase at foreclosure sale on May 4, 1897, with securities and cash belonging to The Atchison, Topeka and Santa Fe Railway Company, of the properties of the [76] Atlantic and Pacific Railway Company, and their subsequent transfer to defendant on June 24, 1897, in exchange for defendant's capital stock and bonds, pursuant to the act of 1897 (29 Stat. 622), see Valuation Docket 625, Atchison, Topeka and Santa Fe Railway Company, 127 I. C. C. 1, at 210, 211, 239, 280-81, 538-48. See also Poor's Manual of the Railroads of the United States, 1897, pp. 275-6, 1284, 1302; Ibid., 1898, p. 282; The Commercial and Financial Chronicle, Vol. 64, for April 3, 1897, at p. 663, for May 8, 1897, at p. 887, and for June 19, 1897, at p. 1180.

4. Defendant is a bona-fide purchaser for value under the act of 1896 (29 Stat. 42), and this circumstance cuts off all rights of the United States, leaving defendant's rights perfect.

United States v. Flint & P. M. Ry. Co., 95 Fed. 551;

United States v. Winona and St. P. R. R. Co., 165 U. S. 463, 474-5;

Logan v. Davis, 233 U. S. 613;

United States v. Chandler-Dunbar Co., 209 U. S. 447.

5. The United States is not entitled to an accounting.

United States v. Whited and Wheless, 246 U. S. 563-4;

United States v. Grand Rapids R. R. Co., 154 Fed. 131, 136-8; affirmed, 165 Fed. 297, 303-4;

United States v. Winona and St. P. R. R. Co., 165 U. S. 463, 481-2;

United States v. Midway Northern Oil Co., 232 Fed. 619 (U. S. D. C., California).

[77]

IV.

THE COURT SHOULD TAKE JUDICIAL KNOWLEDGE OF ALL FOREGOING MATTERS OF FACT AND DISMISS THIS CAUSE (SUPPORTING ALL PARAGRAPHS OF MOTION).

Arizona v. California, 283 U. S. 423, 452;

Nev-Cal Electric Securities Co. v. Imperial Irrigation District, 85 Fed. (2d) 886, 904-5, 906;

Jones v. United States, 137 U. S. 202, 214-16;

Greeson v. Imperial Irrigation District, 59 Fed. (2d) 529, 530-31.

Wherefore, defendant says the cause should be dismissed and all relief denied plaintiff.

Respectfully submitted,

CHARLES H. WOODS,
JOYCE COX,
FENNEMORE, CRAIG, ALLEN & BLEDSOE,
By ROSS F. JONES.

Received copy of foregoing March 31st, 1938.
HARLOW H. AKERS,
Special Attorney,
Dept. of Justice. [78]

APPENDIX 1.

Coues, On the Trail of a Spanish Pioneer, Vol. 2, pp. 409-413. Yabipais Cuercomanches were found by Garces in 1776 from Diamond Creek to the Black Mountains:

> "July 17. I set forth by the southwest, and making a turn to the west, passed over the Sierra de los Pinales that I had named (Sierra) de San Diego, and in the evening arrived at the Arroyo de San Alexo[20]. Today I departed from the road of the going (de la yda, i.e., former route). I went six leagues onward (mas) in the direction said in order to arrive at this arroyo, where I made night, and therein I found a rancheria of Yabipais Cuercomaches, who received me well, on account of the information that they had received from the other Indians,

[20]Arroyo de San Alexo is Diamond creek, or one of the heads of that system of canons, but I cannot locate this Cuercomache rancheria to my satisfaction. The Cuercomaches appear to be a division of Yavapais unknown except for this single mention by our author. Furthermore, we shall have great difficulty in following Garces for the next few days. His language is altogether too short hereabouts to fetch him on to any position whence he can make the northing and the westing presently indicated. I think he must be set to-day over into Mojave

and also because I had in my company two principal Indians of the Jabesua, who were going to trade at the Jamajab, attesting (protextando) therein the peace and harmony recently established. On this day I met four Yabipais who by order of their captain were going to seek me, apprehensive lest some ill had befallen me, in view of my tardiness—an act which proves the great affection he (the captain) had for me.

"July 18. I traveled down the arroyo a league and a half northwest, and then, having gone over some hills, came out upon a little valley that I called (Valle) del Lino for the much wild (flax) that there was, and it gave me great joy, not having seen any since I departed from Aragon. Having traveled three leagues and a half west, I arrived at a rancheria in which they gave me to eat of pinones, with which that land abounds, and made me tarry one day (July 19) in order that others might come to see me. [79]

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county, somewhere north of Peach springs—perhaps at the spring in the collateral canon of Diamond creek down which we have already gone to the Colorado (p. 327). His trail back to Mojave is henceforth entirely north of the route by which he went before, as every place he reaches has a different name, excepting the two main ranges, the Cerbat and Black mountains—his Sierra Morena and Sierra de Santiago. Nevertheless the general trend is the same; the difference is only in details which we cannot satisfactorily make out.

"July 20. I went half a league north to the Aguage de la Rancheria de Santa Margarita; thereafter I traveled two leagues west within sight of (a la vista de) another rancheria, and having passed over the sierra that on my coming I named (Sierra) Morena,[22] I found a well that I called (Pozo) de las Abispas for the many (wasps) that it had. I passed through a valley about four leagues wide, and having gone four leagues more (mas) to the west and one league southwest, I arrived at the rancheria seen (vista), whose captain I had met before; and he went in my company. Here I tarried two days (July 21, 22).

"July 23. I traveled along the skirt of the sierra two leagues, and arrived at a ranche[ria] that had its pozo.[23]

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[22]Here we are confronted with the Cerbat range. This much is certain; but the details given for to-day remain for me unexplained. I cannot point to St. Margaret or Wasp well, nor do I see how Garces crosses the Cerbat range to-day as he says—for we are told to-morrow that he goes two leagues to its summit; what is said of the rancheria sighted is not clear, nor is it quite certain whether he goes 7½ or 11 leagues. I believe that the valley four leagues wide is Hualapais valley, and that our traveler is somewhere on the eastern slope of the Cerbat range, in the vicinity of Isabel spring.

[23]Unidentifiable, as we are not told whether he skirts the Cerbat range north or south; nor are we certain, indeed, whether he is on the east or west side of these mountains. (The Beaumont MS. has sudueste; pub. Doc. prints surueste.)

"July 24. I ascended the Sierra Morena by the east, having traveled to its summit two leagues; thereafter I went one (league) north, and found a rancheria wherein they regaled us; here there are two pozos, and a valley extends on the two sides of the river. This (river) from the Jamajabs upward comes through formidable caxones. In the evening I traveled a league and a half south, and two leagues and a half southwest, and arrived at a rancho that had an aguage; which is yet another (que aun es todavia) of the Cuercomaches.[24]

"July 25. Having traveled two leagues southwest, I came upon the Sierra de Santiago, the which I passed over by the west and northwest, and found a watering-place that I named (Aguage) de Santa Anna; and having gone one

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[24] This day's itinerary is equally confused; I cannot understand his allusions to the Colorado river and its valleys, as well as to its course above Mojave. What he says is perfectly true, but seems out of place; for he is not yet on the Black range, where remarks upon the river valley would be in order. He is in his Sierra Morena, the Cerbat range, which he traverses either through Mineral Park or through Cerbat—most probably the former, as he continues south and west across the head of the Sacramento valley, and at the rancho where he stays to-night is still a couple of leagues northeast of the entrance to Union pass in the Black mountains. The Cuercomache watering-place of which he speaks is not identifiable; there are numerous springs in this vicinity, some of which are now known as Mud, Willow, Cottonwood, and Cane. [80]

league and a half I reached the Rio Colorado; following down the course of which to a distance of yet other two leagues southward I arrived at the Punta de los Jamajabs.[25]" [81]

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[25]This appears to be about the position of Fort Mojave, a few miles above the locality which Garces formerly named San Pedro de los Jamajabs, as we see by what he says beyond, July 26. He seems to have struck the Colorado at Hardyville; whence it is most probable that he crossed the Black mountains—his Sierra de Santiago—by Union pass; though there is another way—a mere trail, not a road—over the mountains which also fetches out at Hardyville. If he made Union pass, his Aguage de Santa Anna is the well-known watering place in that pass. I never heard any other name for it, if it has one.

SCHEDULE OF INDIAN

Reference	Tribe	Description of cession or reservation
Stat. L., Vol. [illegible]	Pojoaque Pueblo	Confirmed by U. S. Dec. 22, 1858; patented 1864; 13,520.38 acres
	Sia Pueblo	Spanish grant 1689; confirmed by U. S. Dec. 22, 1858; patented 1864; 17,511.63 acres
	Sandia Pueblo	Spanish grant 1748; confirmed by U. S. Dec. 22, 1858; patented 1864; 24,187.29 acres
	Isleta Pueblo	Confirmed by U. S. Dec. 22, 1858; patented 1864; [illegible],080.31 acres
	Nambe Pueblo	Confirmed by U. S. Dec. 22, 1858; patented 1864; [illegible],580.33 acres
	Laguna Pueblo	Spanish grant 1689; 125,225 acres
	Santa Ana Pueblo	Confirmed by U. S. Feb. 9, 1876; 17,361 acres
	Zuñi original grant	Spanish grant 1689; 17,581.27 acres
	Moki	Country claimed by them at beginning of their relations with the U. S.
	Walapai	Country claimed by them at beginning of their relations with the U. S.
	Mohave	Country claimed by them at beginning of their relations with the U. S.
	Yuma	Country claimed by them at beginning of their relations with the U. S.
	Cocopa	Country claimed by them at beginning of their relations with the U. S.
	Papago Pima and Maricopa	Country claimed by them at beginning of their relations with the U. S.
	Apache Eastern bands	Country claimed by them at beginning of their relations with the U. S.
	Apache Western bands	Country claimed by them at beginning of their relations with the U. S.
	Sauk and Fox living in Iowa	Land owned and occupied by them in Tama county, Iowa

LAND CESSIONS—Continued.

Description of cession	Number	Date	Area
Here insert date and area			
	674		
	676		
	677		
New Mexico	678		
	679		
	680		
	681		
	682		

No treaty of purchase was ever made with these Indians. Their original claim is here shown on Arizona map No. 1. By Executive order of Dec. 16, 1882, the President set apart a reserve for them, which is shown on Arizona map No. 2.

No treaty of purchase was ever made with the tribe. The U. S. assumed title to their country, the boundaries of which are shown on Arizona map No. 1, and afterwards set apart a reserve for the by Executive order of Jan. 9, 1883, which is shown on Arizona map No. 2.

No treaty of purchase was ever made with the tribe. The U. S. assumed title to their country, the boundaries of which are here shown on Arizona map No. 1. Most of them have been concentrated on a reserve known as Colorado River reservation, shown on Arizona map No. 2.

No treaty of purchase was ever made with the tribe. The U. S. assumed title to their country, the boundaries of which are shown on Arizona map No. 1. Most of them have been concentrated on the Colorado river and Yuma reservations shown on Arizona map No. 2.

Arizona

No treaty of purchase was ever made with the tribe. The U. S. assumed title to their country, the boundaries of which are shown on Arizona map No. 1. Most of them have been concentrated on the Colorado river reservation, shown on Arizona map No. 2.

No treaty of purchase was ever made with these tribes, who have a common origin. The U. S. took possession of their country, the boundaries of which are shown on Arizona map No. 1. Reservations were, however, assigned them, upon which they were concentrated, known as the Papago, Gila River, Gila Bend, and Salt River reserves, all of which are shown on Arizona map No. 2.

The Apache alluded to here as Eastern bands comprised the bulk of the Jicarilla and Mescalero Apache. Their country lay to the eastward of the Rio Grande river, extending into Colorado and Texas, where it overlapped the Kiowa and Comanche claim. A few of them concluded a treaty Oct. 17, 1865, by which they agreed to confederate with the Cheyenne and Arapaho upon a reserve assigned the latter in Indian Territory. Subsequently, by treaty of Oct. 21, 1867, they were confederated with the Kiowa and Comanche upon a reserve assigned the latter tribes in Indian Territory. Those so confederated relinquished their claim to ancestral territory, but they were few in number. No other treaty of purchase was made with these Apache, but those not confederated with the Kiowa and Comanche have been assigned reservations from time to time, all of which are shown on New Mexico map No. 2. The original domain of the Eastern Apache is here partially shown on New Mexico map No. 1, and is fully delineated on special Texas map.

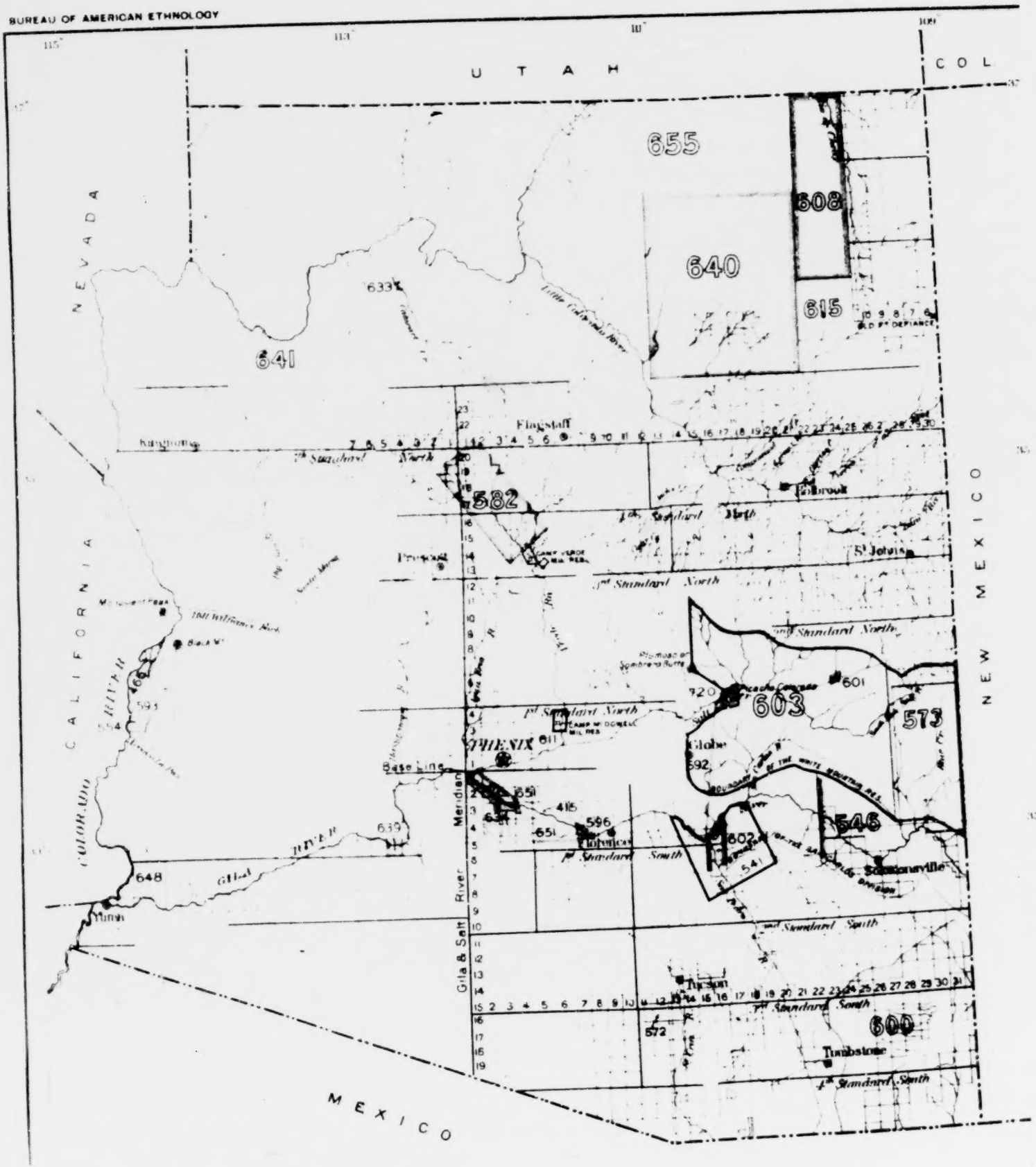
New Mexico

The Apache here alluded to as Western bands comprise all those bands whose ancestral territory lay to the W. of the Rio Grande river, the most important of these bands being the Tonto, Mimbres, Mogollon, Coyotero, Pinal, and a few of the Mescalero and Jicarilla. No treaty of purchase was made with them. The U. S. took possession of the country, assigning them from time to time sundry reservations, the boundaries of which are shown on Arizona and New Mexico maps No. 2. The original domain is here shown on Arizona and New Mexico maps No. 1.

Arizona

These Indians are mostly Fox, and belong properly to the Sauk and Fox of the Mississippi. They formerly resided with their brethren on the tribal reserve in Kansas, but becoming dissatisfied with the allotment of lands on that reserve, they returned to Iowa. Since 1867 they have been paid their

Iowa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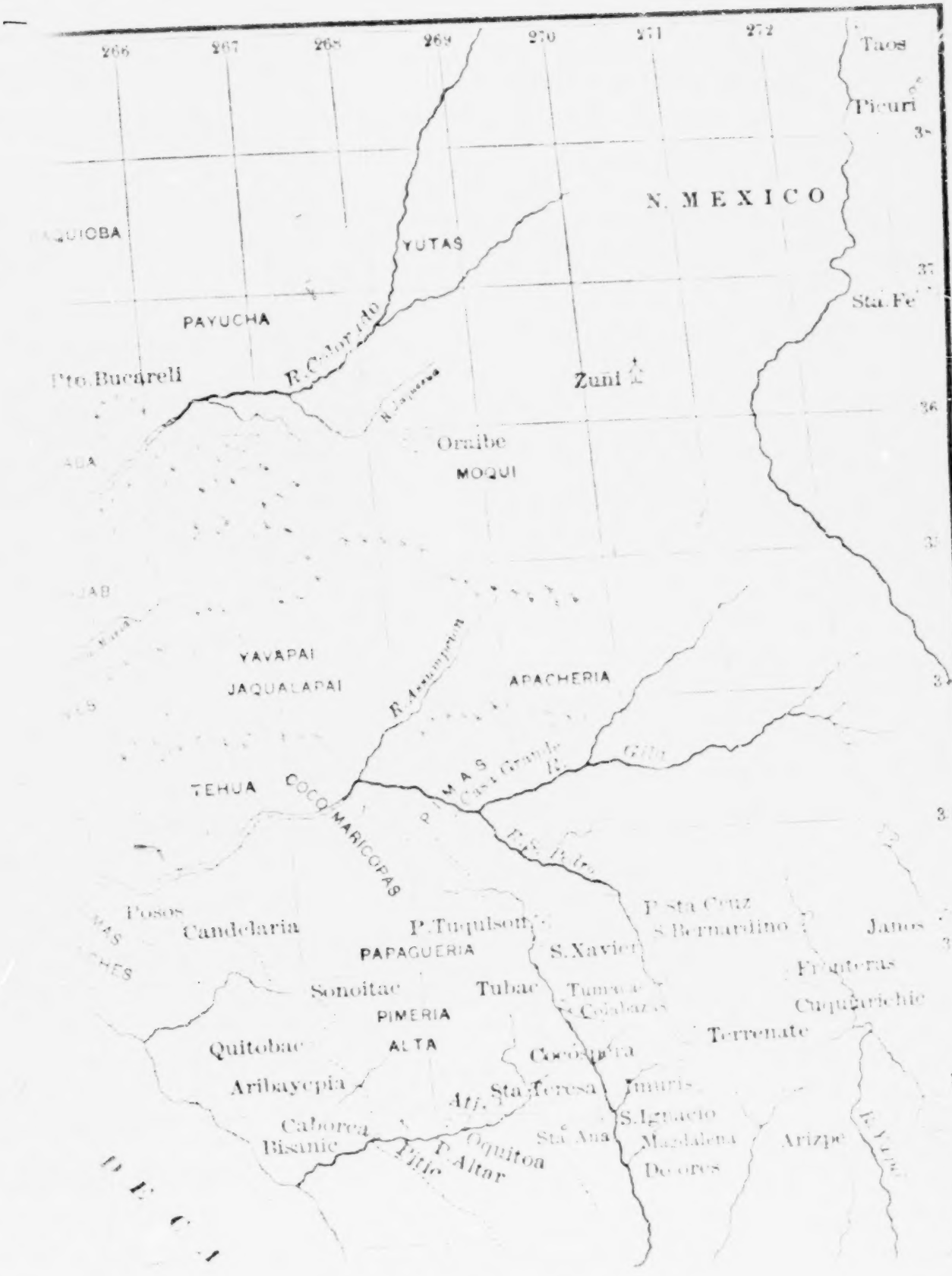
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YAVAPAI
JAQUALAPAI
APACHERIA
TEHUA
COCOMARICOPAS
PIMAS
Gila
Posos
Candelaria
P. Tupulson
PAPAGUERIA
S. Xavier
P. sta Cruz
S. Bernardino
Janos
Fronteras
Sonoitac
Tubac
Tumacacori
Cocleazes
Cuquiarichic
PIMERIA
ALTA
Quitobac
Terrenate
Arivaypia
Sta. Teresa
Caborca
Bisanic
Oquitoa
P. Altar
S. Ignacio
Sta. Ana
Magdalena
Arizpe
Dolores

APPENDIX 4.

Coues, On the Trail of a Spanish Pioneer, Vol. 1, page 224, footnote 31:

"31. Cajuala Sevinta, Cajuala Chemebet, etc. As Garces states, these were evidently names applied to various small Shoshonean tribes. The Sevinta or 'Cajuala Sevinta' were apparently the Shivwits, who occupied the plateau of the same name, bounded by the Grand Wash cliffs, in extreme northwestern Arizona, although they extended into the surrounding region. Some of the Shivwits were seen as far south as Peach spring in 1871. They were a division of the Paiute, and are not popularly distinguished from the rest of that Shoshonean tribe. Beadle called them 'Lee-Biches;' Cortes corrupted Garces' form of the name into Chemequesabinta; Orozco y Berra, Chemegue sebita and Chemegue sevicta. Other forms: Seviches, Sheav-wits, Sherwits. Major J. W. Powell, 1873-74, was the first to call attention to the tribe under its proper name, and probably the first white man to see them after Garces' time. They then numbered 182.

"I do not know the signification of 'Cahuala' in connection with the tribal names. There is a Shoshonean tribe known as Kauvuya, formerly in Cabezon, San Jacinto, and Coahuila valleys, E., S. W., and S. E. of San Bernardino, Cal., and thence extending in straggling bands to the

river Colorado. In 1873 they numbered 1,937 in 13 rancherias. They were later placed on the Mission reservation, where they are still officially regarded as 'Coahuilas.' Other forms: Caguilla, Caqulla, Cahnillo, Cahual-chitz, Cah-wee-os, Cah-willa, Carvilla, Cavio, Caweo, Cohuilla, Cowela, Cowilla, Kahweaks, Kah-we-as, Kah-weyahs, Kavayos, Koahualla.

"Jose Cortes (in Whipple's Report, p. 125-126) has: 'Northward of the river Colorado live other bands, which may be considered as one numerous nation; they are the Chemeque-caprala, Cehmeque-sabinta, Chemequaba, Chemeque, and Payuches (Paiute); all speaking the same language, with the exception of the last.' All of these, except the 'Payuches,' would seem to be divisions of the Chemehuevi, and probably the Shivwits or 'Sabinta' were an offshoot of the same. Both the Shivwits and Chemehuevi are now regarded as Paiute divisions—this is based on linguistic classification by Powell. Cortes' 'Caprala' seems to be the same as Garces' 'Cajuala.' I can identify them with no other than the Kauvuya or 'Coahuila,' who, as previously mentioned, extended to the Rio Colorado. On a Yuma map of the river in Whipple, iii, pt. 3, p. 16, the 'Ca-hual-chitz' are located above Bill Williams' fork (Hah-weal-ha-mook) and the Mohaves.—F. W. H." [86]

APPENDIX 5.

A. W. Whipple, Reports of Explorations and Surveys to Ascertain the most Practical and Economic l Route for a Railroad from the Mississippi River to the Pacific Ocean, made under the direction of the Secretary of War in 1853-54, according to Acts of Congress of March 3, 1853, May 31, 1854, and August 5, 1854, Volume III, 33rd Congress, 2nd Session, Senate Executive Document 78.

In chapter 12 (beginning page 94), the narrative carries the party westerly through Aztec pass and into the Aquarius range of mountains to White Cliff Creek, a tributary of the Big Sandy, where Indian signs and Indians were encountered (at 96). Some distance north of the creek, after following a ravine, camp was made. "The Indians are still lurking about. . . . Leroux supposes these Indians to be Yampais, who range to the junction of Rio Virgin with the Colorado. Towards the northeast are the Cosninos. South of them, and to the Gila, the Tontos are supposed to roam." (at 97.) Some Indians came to camp. "Our new friends confirmed our ideas regarding the locality of some of the Indian tribes. Cosninos, they said, roamed to the Northeast; Pai-Utes lived northwest, upon the further side of the Colorado. They professed to be Yampais; or, as they pronounced it themselves, "Ya-ba-pais." (97-8.)

Having located and named "Cactus," a pass north of White Cliff Creek (98), Whipple went down White Cliff Creek to the Big Sandy (100).

Between the mouth of the Santa Maria and the Colorado, Whipple reports information that (a) demonstrates he was conscious of the Walapai as a group distinct from Yampais and (b) affords an example of a visitation which increased competition for water and food sources, inducing wandering and conflict:

"We could only make out that war, or some other calamity, had visited all the Indians of the Colorado from the Gulf upwards, viz: the Cocopas, Comoyeis, Cuchans, Ya-va-pais, Chem-e-hue-vis, Mac-ha-vis, Ca-hual-chitz, Mat-hat-e-vatch, and Hual-paich. They have suffered greatly for want of clothing and food, which, during the troubles, they had not been able to produce." (at 110.) [87]

APPENDIX 6.

Papers of the Archeological Institute of America, Part I of Final Report of Investigations among the Indians of the Southwestern United States, carried on mainly in the years from 1880 to 1885, by A. F. Bandelier, pp. 30-33.

> "Entirely different was the fate of the Indian in the mountains. There it was, above all, linked to the distribution of water. Scarcity of permanent water is one of the dark sides of many regions in the Southwest; wherever water appeared to be in permanence, therefore, it created a tendency to remain and to settle. The

approach of others to the same spot caused dispute, estrangement among people of the same stock, secessions, warfare, displacements. Water was the most powerful agent which propelled the settlement of these regions; at the same time, it was the most immediate cause for strife and disturbances." (p. 30.)

"It is difficult to trace the migration lines of the Indians on a sweeping scale. In the Southwest there seems to be, as in the configuration of the country, a general trend from north to south, but transverse movements have been as common in the vicissitudes of the same tribes as transverse upheavals of the surface, and often barriers of that nature have changed the fate of a group, compelling it to retrace its steps.——even to 'go back to the place of beginning.'" (pp. 31-32.)

" * * * Comparative permanence of abode was possible in the Southwest only where irrigation could be resorted to, * * *." (p. 33.)

[88]

APPENDIX 7.

Official Testimony of the Honorable John Collier, Commissioner of Indian Affairs, and Report of the Interior Department, Hearings before the Committee on Indian Affairs, United States Senate, 75th Congress, 1st Session, on S. 1651 and S. 1779.

S. 1793, passed by the 74th Congress, First Session, would have amended the act of May 18, 1928 (45 Stat. 602), to provide that compensation could be obtained in a Court of Claims for (a) Indian tribes and bands with whom treaties have been made but not ratified to the extent of $1.25 per acre for the lands they would have obtained under the treaties, plus value of other benefits under the treaties, minus enumerated offsets, and (b) for Indians with whom no treaties have been made for the acreage they had occupied, valued at $1.25 per acre less benefits. As respects (a), the act was, as the 1928 act had been, retroactive ratification of the treaties. As respects (b), the act was construable as retroactive recognition of some sort of possessory right, although proponents of the bill argued for it as much on the ground of ethical justice as on the ground of legal right.

The President's veto message, dated June 30, 1936, read in part as follows:

> "In addition to having the effect of imposing a very heavy financial burden on the Government, the bill would create a dangerous and undesirable precedent for similar endeavors on the part of the present descendants of other aborigines to secure payment for lands occupied by their ancestors at the time of the original settlements in the United States or the acquisition of territory by this country. Not only would such a course of action result in an

incalculable financial burden to the Government, but justice to the Indians of today does not seem to require this type of reparation." (Printed in Hearings before the Committee on Indian Affairs, United States Senate, Seventy-Fifth Congress, First Session, on S. 1651 and S. 1779, March 8, 9, 11, and 12, 1937, p. 3.)

The history of efforts in behalf of the California Indians and the reasons for the President's and Department of the Interior's objections to the vetoed measure, and the official viewpoint with respect to the bills pending in the seventy-fifth Congress, appears in the following testimony of the Hon. John Collier, Commissioner of Indian Affairs.

"Commissioner Collier. . . . This jurisdictional legislation for California goes away back to 1920. There has not been a year since 1920 that there has not been a bill pending. Finally, in 1928, a bill was enacted. That bill had been worked out by Commissioner Burke with considerable care. Commissioner Burke was a man who was well acquainted with Indian land law, and he drew a bill designed to get a specific result. The departmental report outlined what that result would be, and Congress passed the bill. [89]

"The point I am bringing out is one which I think is necessarily controlling on any legislation. It is this: California was a part of the Spanish territory. Under Spanish law Indians

acquired no legal right to land merely from the fact of occupancy. They acquired a legal title only if a grant was made to them.

"Senator Chavez (presiding). Like any other citizen?

"Commissioner Collier. Like any other citizen.

"In other words, Spain did not recognize the possessory right except as something which might be persuasive with the sovereign to make a grant, a consideration that might enter into the making of a grant. In other words, a possessory right had no legal existence; it was merely a factor in policy. That is very well known to Senator Chavez from his knowledge of the New Mexican law.

"In California the only grants made affecting Indians were grants made to the mission societies—to the Franciscan fathers or to the church—which grants were canceled out prior to American occupancy. So that at the time we took over California there were no property rights in the Indians. I am speaking, now, from the point of view of the Spanish law.

"Immediately after we took California over, steps were taken to create property rights in the Indians. That is, treaties were negotiated by executive officers of the Government and with Indians. I might remind you, Senator Chavez, that in New Mexico, at the same date treaties were being negotiated with the New

Mexico tribes by Calhoun. The treaties with the California Indians and with the New Mexican Indians came back here and the Senate did not validate either the California or New Mexico treaties.

"The Chairman. Were the treaties presented to the Senate for ratification?

"Commissioner Collier. Yes. They were debated extensively. There were opposing memorials adopted by the California Legislature. The proposed treaties would have given the Indians a little over 8,800,000 acres of land, including land with a great deal of gold in it. But the gold rush was on and there was not a chance in the world to get those treaties approved by the Senate, and they were not ratified. Therefore no contract was created and no property right or rights came into being through the proposed treaties.

"Under Spain title through mere occupancy could not arise. The question therefore, is, Did such a right arise after the United States took over the country?

"Senator Frazier. An agreement was made between the Indians and the representatives of the Government? [90]

"Commissioner Collier. Yes. It was a treaty. There were numerous treaties.

"Senator Frazier. All they lacked was ratification by the Senate?

"Commissioner Collier. Yes; just as a lot of other agreements have been made and not rati-

fied. I was referring to the incident that took place in New Mexico in the very same years and nearly the whole State was occupied and used by the Indians.

"Senator Chavez (presiding). What was the background of the Indian holdings in California during the Mexican regime?

"Commissioner Collier. There was no background except that some of the Indians had congregated under the missions.

"Senator Chavez. Was that under the Spanish regime?

"Commissioner Collier. The Mexican regime destroyed the church title.

"Senator Chavez. Altogether?

"Commissioner Collier. Yes; they revoked it, abolished it. An Indian did not hold title even under Spain; he was merely a ward of the church, and as such he had the use of land that had been granted to the church. In New Mexico it was different. Grants were made to tribes of Indians——

"Senator Chavez. Just for my own information, were not any of the treaties made in New Mexico ratified at all?

"Commissioner Collier. None of those treaties were ratified; only the Navajo treaty which came along later.

"Senator Chavez. That is the one I had reference to.

"Commissioner Collier. All of the other New Mexican tribes held their land either by Span-

ish grant or congressional or Executive order. There are no treaties in New Mexico except the Navajo treaty. The situation then was that the treaties having been rejected, the California Indians had no legal right that they could enforce." (Hearings, pp. 40-41.) [91]

"Commissioner Collier. * * * Last year a bill was passed by both Houses of Congress. The Budget was opposed to it. It later developed that the Department of Justice was energetically opposed to it. The Interior Department endorsed it. We endorsed it in spite of the fact that there were speculative elements in the bill and obscure phrases. We then went to the President to try to persuade him to sign it, and he presented us with not only the Budget argument and the Department of Justice argument which was made to him and which really could not be met, but pointed out that the bill as passed by Congress threw the case over into the Court of Claims for a decision by the Court of Claims as to whether the Indians had acquired title to the lands through possessory claims; that is, as to whether possession had created title. There has not yet been any case where the higher courts have held that possession created title.

"Therefore, we were on the horns of a dilemma. The Court of Claims might find no judgment at all, or they might find in excess of $50,000,000. The possibilities ran all the way from zero to some vast sum.

"The President was very definite that he did not want to have that kind of operation precipitated. Furthermore, it was evident that the precedent of treating the possessory right as a legal right for the Indian tribes was incalculable in its possible consequences; that it might let the Government in for sums of gigantic dimensions in behalf of other tribes.

"That is what the Department of Justice had argued. But the President was hospitable to the idea of doing something to determine the need of the California Indians and meeting that need generously. And it is along that line that I believe something might be put through and signed. We admit a moral obligation to do something. The moral claim of these Indians is simply an overwhelming one, even though it has no legal or equitable character." (Hearings, pp. 43-4.)

"The Chairman. What other States had treaties entered into and submitted to the Senate for ratification that were never ratified?

"Commissioner Collier. I cannot answer that, except that agreements were negotiated very generally. There was an agreement with the Navajo tribes. That was entered into with the Army. They were going to be given lands in return for helping to run down Geronimo and catching him. That was never validated.

But the Navajo Indians cling to that just as tenaciously as the California Indians cling to their unratified treaties. There must be scores of commitments entered into by negotiators which were not ratified. In other cases no commitments were entered into. In Alaska we just took everything. [92]

"You will recall that the Pueblo Indians came in with a great many evidences of possessory rights; and there was one big area where the Pueblos actually had had exclusive grazing benefits for many years, only it was not a grant, hence no property right had arisen.

"As for creating a new precedent, a precedent is already created by a gratuitous settlement of $6,000,000 just as much as it would by a gratuitous settlement of $20,000,000; but at least we might escape opposition from the Department of Justice. The Department of Justice, I believe, would oppose anything which translated a mere possessory right into a legal title, thereby laying a basis for illimitable suits." (Hearings, p. 46.)

On April 28, 1937, the Department of the Interior officially submitted to the Committee on Indian Affairs a review of the whole matter, setting forth the official attitude. This letter is reprinted in Senate Report No. 1041, 75th Cong., 1st Sess. (hearings, pp. 357-72, at 366). The report in part reads as follows:

"California was an area of relative density of Indian population. The Indians, numbering 200,000 or more, were peaceable. Their institutions were of primitive character, but their aboriginal land tenure presented an entirely definite picture. Hundreds of tribes and bands occupied territories whose boundaries were known to all and were acknowledged and respected by neighboring tribes and bands.

"Under Spanish sovereignty, title was conveyed to the Indians in portions of the Southwest, but not in those in the area which is now California. The Mission orders did receive titles to land, and these mission lands were populated by Indians under the missions.

"In 1834, under the Mexican Government, the missions were secularized and the lands were expropriated. The first major extermination of California Indians then took place. I quote from the report of C. E. Kelsey, special agent for the California Indians, dated March 21, 1906, which report is contained in the House hearings of March 23, 1920, page 123, dealing with the first jurisdictional bill for the California Indians (H. R. 12788):

" 'In the year before the secularization, 1834, the mission records showed some 34,000 converts in the mission strip. There were probably some unconverted Indians termed "gentiles." Only about [93] 3,000 descendants of these mission Indians are alive today. Most of the decrease is understood to have taken place be-

tween 1834 and 1849. A few of the Indians who had come from the San Joaquin Valley returned there. In southern California those who were able to return to the mountains thus saved themselves from extinction, but the great body of the mission Indians undoubtedly perished where they had lived. Most of them died during the Mexican period, and not under that of the United States.'" (Hearings, p. 366.) [94]

APPENDIX 8

Congressional Globe, March 1 and March 2, 1866, relating to the amendment of Section 2 of the Act of July 27, 1866, by adding the words "and only by their voluntary cession."

"Mr. Pomeroy. The last clause of the second section reads thus:

"The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian title, &c.

"That is the first place in all the bill where the word 'Indians' is used, and the word 'said' should be stricken out." (p. 1101.)

"Mr. Land, of Kansas. At the request of the delegation from the Chickasaws and Cherokees, who reside in and own the greater portion of what is known as the Indian Territory, I call the attention of the Senate to one feature of this bill. The title of the Indian country is in five tribes, and we are under treaty obligations not to enter upon them without their consent. They are strenuously opposed, and pro-

test against selling any portion of their country for white settlement. This railroad will run through the entire length, I believe, of the Indian Territory. The second section of this bill contains the following provision:

"That the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian title to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill.

"For them, and in their name, and in behalf of the Government, I desire to have that clause stricken out, a clause compelling the Government to extinguish the Indian title so far as the Indian Territory is concerned. We are under the most solemn treaty stipulations not in anywise to intrude upon them. The title to the land is in them, and they are strenuously opposing any sale of their land for white settlement. They have suggested, in the treaties they are now making, that if a railroad is to be made through that country, each tribe having a separate government, the sale of the lands by the Government or by the railroad company shall be to some member of their tribes and not to white men.

"It may be well for me to state that there is now pending before the Committee on Territories a bill for the organization of this Indian country, having in view the building up of an

Indian Territory, excluding all white men therefrom. This bill if it passes will destroy the theory of that bill, and will expose these Indian tribes to the same encroachments and the same fate that has overtaken them and other Indian tribes before. I have not the treaties with these tribes before me, but the President pro tempore of the Senate laid those treaties [95] before this body at the last session. They are of the most solemn character. We have agreed that there shall be no government extended over them without their consent; that there shall be no encroachments upon them; and now I submit to the Senator from Missouri as well as to other Senators whether it is expedient for the Government to bind themselves to extinguish the Indian title within that Territory, which will open up that country, as I have before remarked, to white settlement and drive off the Indians as they have heretofore been driven off.

"Mr. Brown. I do not know that there is anything in this bill that will bind the Government of the United States to take any action that would conflict with its treaty obligations. I do not suppose that there is. I do not suppose that we could bind the Government to do so. If there are any obligations of that sort, of course they will control the action of the Government, and this clause will not interfere with it. If there are not, I see no objection to the

clause. I do not participate in the view that the Senator seems to have, that that country should be kept exclusively for Indian tribes any further than we are obligated to do so now.

"Mr. Lane, of Kansas. What I have said has been at the request of the delegation of Chickasaw and Cherokee Indians who are now in the Marble Room.

"Mr. Brown. This is the same clause that has been put in all these railroad bills in regard to extinguishing Indian titles. It does not differ from them in any respect.

"Mr. Lane, of Kansas. We have heretofore agreed to extinguish a possessory title that the Indians have; but here is a legal title. The lands are patented to them. I now have the treaties before me. Every Senator on this floor is aware of those stipulations. They are of the most solemn character that we will not encroach upon them, that we will not intrude upon them without their consent; and yet this bill proposes to compel the United States to extinguish their title. To be sure there is a clause that it shall be extinguished 'as rapidly as may be consistent with public policy and the welfare of the said Indians;' but if this bill passes we agree to extinguish that Indian title, which is an agreement on our part to destroy and trample under foot the most solemn treaty stipulations that we have with these Indian tribes.

"Mr. Brown. On the contrary, the language of the clause expressly prohibits that thing. It says that the Indian title is to be extinguished as far as is consistent with the policy of the Government.

"Mr. Lane, of Kansas. 'The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian title to all lands falling under the operation of this act, and acquired in the donation to the road named in the bill.' It seems to me that that is just the same as if the Government were to agree to extinguish the title to my land or to your [96] land. We have never engaged to do any such thing heretofore. We have agreed to extinguish a possessory title, but not where the title is in fee as in this case.

"Mr. Grimes. I should like to be informed whether or not this road is to run through the Cherokee, Choctaw, and Chickasaw lands?

"Mr. Lane, of Kansas. Their entire lands.

"Mr. Grimes. By the provisions of this bill, if it should be enacted into a law, will this company acquire a title to land belonging to these Indians?

"Mr. Lane, of Kansas. They acquire alternate sections, just as has been granted heretofore in these bills.

"Mr. Pomeroy. Oh, no, not the alternate sections; nothing but the right of way, under this bill.

"Mr. Lane, of Kansas. The third section of the bill provides:

"'That there be, and hereby is, granted to the (Southern) Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt.'

"Then there is the other clause that I have read making it——

"Mr. Brown. The Senator understands that that does not refer to Indian land, the title to which is not in the United States.

"Mr. Lane, of Kansas. But here is a clause at the end of the second section that compels the Government to extinguish the Indian title along the line of this road.

"Mr. Grimes. Then I understand that the idea of the Senator from Kansas is, that when the Government shall extinguish these title, that title is to inure to the benefit of this company.

"Mr. Lane, of Kansas. Certainly; and it is peremptory on the Government to extinguish

the Indian titles just as was provided in the bills that were passed for railroads in the State of Iowa.

"If the Senator from Missouri desires these treaties to be read again, (as they have been read in the Senate,) I have them here and can read them. I repeat, they are of the most solemn, peremptory, and emphatic character, that we will not intrude upon nor encroach upon these Indians. I am as anxious [97] to have this road as the Senator from Missouri; but I suggest to him whether, inasmuch as we are trying to get up a government for these Indians, in order that everything may be consistent, it would not be as well to refer this bill to the Committee on Territories, which now has before them a bill for the organization of a territorial government for these Indians, so that the two bills may be made to harmonize. The Indians would have no objection to this railroad, provided the grant is made through their governments.

"I desire to say to the Senator from Iowa and to the other Senators that the Chickasaw government (and a delegation of them are now in the city) has already granted a charter for a railroad company through their nation. They claim the same jurisdiction over their territory that Missouri or Iowa does over its territory. The question, I submit, in their name and for them is, that we ought not to compel the Gov-

ernment to extinguish the title in their country if the title when extinguished is to go into the hands of white settlers.

"Mr. Brown. I suggest to the Senator if that is his object, I do not think the clause bears the construction which he puts upon it. He may strike out the word 'welfare,' and insert the word 'assent.'

"Mr. Lane, of Kansas. I will suggest to the Senator from Missouri that what these Indian tribes desire is, that they may make the grant. The Chickasaw tribe of Indians, in making their grant, reserved a bonus to their nation. What they want of your company is, that instead of obtaining the grant of land through the General Government, they should get it through them, giving them a bonus. The Chickasaw Indians reserved a bonus of two per cent. of the net profits of the road to which they made a grant. They want to go forward and aid this road, and you will have no trouble in getting your land grant from them.

"Mr. Sherman. As it is probable that we can hardly pass this bill before the morning hour expires, I should like to take up a bill to which I am sure there will be no objection.

"Mr. Brown. There is nothing to prevent the passage of this bill now if this matter is passed upon.

"Mr. Sherman. If there is to be no further debate upon it, I shall not object; but I should

like to have the bill to which I refer passed before the regular order of the day comes up.

"Mr. Brown. I will move to insert in the seventeenth line of the second section, after the word 'Indians,' the words 'and only by their consent;' so that the clause will read: [98]

> "'The United States will extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, and only by their consent, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the bill.'

"Mr. Pomeroy. I do not think it necessary to make that amendment. It will not do any good. You cannot extinguish the Indian title except by their consent.

"Mr. Brown. I know that; but it brings it within the objection that the Senator's colleague has taken.

"Mr. Lane, of Kansas. While that may be true, you may bind the Government to do it.

"Mr. Pomeroy. This does not bind the Government to do it.

"Mr. Lane, of Kansas. Yes, sir. I so understand it.

"Mr. Brown. I do not so understand it.

"Mr. Johnson. I suggest to my friend from Missouri that perhaps he had better let this subject go over until to-morrow. If there is any doubt whether, as the bill now stands, it would

interfere with the treaties, we ought to solve that doubt very positively before proceeding further.

"Mr. Brown. I do not see how there can be any possible doubt, when the language of the bill leaves it subject to the action of the Government in the future exclusively.

"Mr. Johnson. I do not say that there is any well-founded doubt: but I understand that the Senator from Kansas has a doubt on that subject.

"Mr. Brown. I believe this amendment removes even his doubts.

"Mr. Johnson. He says not; and certainly no member of the Senate is disposed to interfere with the obligation of treaties. I am satisfied the Senator from Missouri is the last member who would do it.

"Mr. Brown. I am willing to let the bill go over until to-morrow, and we can take it up then and dispose of it.

"The President pro tempore. By common consent the bill will be considered as postponed until to-morrow." [99]

On March 2, 1866 (Congressional Globe, p. 1132), the following occurred in the Senate:

"Mr. Brown. I move that we now resume the consideration of Senate bill No. 20.

"The motion was agreed to; and the Senate, as in Committee of the Whole, resumed the consideration of the bill (S. No. 20) granting lands

to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, by the southern route, the pending question being an amendment of Mr. Brown to insert in the second section after the word 'Indians,' in line seventeen, the words 'and only by their consent.'

"Mr. Brown. I modify the amendment so as to say 'and only by their voluntary cession.' That is the language of the treaties, and I prefer to use the same language.

"The President pro tempore. The Senator has the right to modify his own amendment.

"Mr. Lane, of Kansas. Let the clause be read as it will stand if thus amended.

"The Secretary. If the clause be amended as proposed, it will read as follows:

> "The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act.

"Mr. Lane, of Kansas. I ask the Senator if that includes the right of way.

"Mr. Brown. Yes, sir; it includes everything.

"The amendment was agreed to.

"The bill was reported to the Senate as amended, and the amendments were concurred in.

"The bill was ordered to be engrossed for a third reading, was read the third time, and passed.

"On motion of Mr. Brown, its title was amended by striking out the words 'by the southern route.'" [100]

APPENDIX 9.

Congressional Record, March 28, 1918, 4194 et seq. Origin and Reasons for Act of 1918, 40 Stat. 570, Title 25, Sec. 211 U.S.C.

"Mr. Smith of Arizona. I offer the amendment which I send to the desk.

"The Presiding Officer. The amendment proposed by the Senator from Arizona will be stated.

"The Secretary. On page 25, line 13, it is proposed to add the following:

"That hereafter no Indian reservation shall be created nor shall any additions be made to one heretofore created within the limits of the States of New Mexico and Arizona, except by act of Congress.

"Mr. Smith of Arizona. Mr. President, I wish to detain the Senate but one minute about this amendment. States other than the States of New Mexico and Arizona have been protected as proposed by the amendment. Only last year there was created an enormous Indian reserva-

tion, for which there was no earthly need, in the county in which I live. It is now threatened by Executive order to enlarge other reserves affecting both New Mexico and Arizona. Notwithstanding, as I am informed, the Indians now have something like 10,000 acres of land apiece for every member of the tribe, this policy has been pursued to a point which makes us feel that when we make an appropriation from the Treasury we must have the guarantee of an act of Congress to make it good. There is no limitation on the power of the Commissioner of Indian Affairs to recommend the extension to any distance or for any length of these Indian reservations in our State for the enlargement of which there is no earthly necessity.

"Anyone who will look at conditions in that State and at the map will know, I think, before any more public land is taken away from the people who have got to meet conditions subsequent to this war, when the Indians are so amply provided for, that it would be an outrage on the people not only of that State, but upon all who are interested in the public lands of the United States.

"In connection with this matter I have prepared an exhibit, and I have had my secretary make it a little bigger, showing the areas which are devoted to Indian and forest reservations. There (indicating) are the Indian reserves

which have already been made in my State, which are shown in red; the green indicates the forest reserves, and the white indicates the desert and mountain lands; all that is left. There has been taken from that State nearly half of the best land in the State. It has been dedicated to the balance of the United States in the shape of forest reserves. The department has given the land which is indicated on this map by red to the Indians, when there are 20 white men to one Indian in the State. That land (indicating) is all that is left to the State of Arizona with which to pay taxes to support its government. Then it is sought on behalf of the [101] Commissioner of Indian Affairs to run across the line into New Mexico. Senators will observe from the map that in connection with the Navajo Reservation the yellow area goes clear into the adjoining State of New Mexico. To make these enlargements either in Arizona or New Mexico is contrary to all common sense and reason.

* * * * * * *

"Mr. Smith of Arizona. The amendment provides that no other Indian reservation shall be created or that no Indian reservation now in existence shall be enlarged without being authorized by an act of Congress. That is all. It is proposed to retain what Congress ought always to have kept—the right of disposition of the public lands.

"Mr. Ashurst. Mr. President, I hope the amendment which has been proposed by my colleague will be adopted. I speak with familiarity as to the Indian reservations in Arizona and New Mexico. The reservations in those two States are large enough now, and even as I speak I have before me a letter from the Bureau of Indian Affairs, in which I am advised that the Interior Department has under consideration the question of making a large addition to a certain reservation in New Mexico and Arizona.

"There was a tribe of Indians in Arizona, to wit, the Papagoes, which the Arizona delegation in Congress felt ought to have some small additions made to their reservation to take care of the watering places used by those Indians; indeed, we went so far in 1916 as to ask the department to set aside a proper area as an addition to their reservation, but when the Executive order came down we found to our amazement that instead of a few thousand acres being set aside, over 2,000,000 acres were set aside and it required months for us to correct the error.

"Mr. Jones of Washington. Mr. President——

"The Presiding Officer. Does the Senator from Arizona yield to the Senator from Washington?

"Mr. Ashurst. I do.

"Mr. Jones of Washington. Does not the Senator from Arizona think that under the circumstances it would be wise to insert a provision in this amendment to the effect that any reserve created by Executive order shall be considered unlawfully created after this date, or something like that, to prevent the establishment of a reserve by Executive order before this bill goes into effect?

"Mr. Ashurst. I think that is a very wise plan, and I hope my colleague will give his attention to it.

"Mr. Jones of Washington. It will be done, if they contemplate doing it, before this bill goes into effect. I suggest whether it would not be possible to insert a provision in this bill to make unlawful the creation of such reservations after this date? I merely make the suggestion, though I do not think the department will do anything contrary to the spirit of the amendment proposed. As will be remembered, however, as the [102] Senator suggests, when some years ago a bill was passed here declaring that no further reservations should be made in certain States, the President, before the bill became a law, made reservations as big as he pleased, and then signed the bill.

* * * * * * *

"Mr. President, in my opinion, Arizona has too many Indian reservations. The creation of a reserve deprives a State of the right to tax the land within its borders and is an interference with the rights of the State. It is an outrage that millions of acres of land in a sovereign State of this Union should be set aside and forever held without the right of taxation by the State. That never was in contemplation by the framers of the Constitution, because the National Government, if it should carry that principle to the extreme, would have the power to almost annihilate a State by withdrawing great portions of the land of the State from taxation.

"Mr. President, it seems to me if there is no provision of law prohibiting the setting aside of Indian reservations that we ought to adopt such a provision now and have it in force as quickly as possible, so that the rights of the States may be protected against the encroachments of the Federal Government in that respect.

"The Presiding Officer. The question is on agreeing to the amendment offered by the Senator from Arizona (Mr. Smith).

"The amendment was agreed to." [103]

APPENDIX 9 (a)

Extracts from Senate Report 609, 61st Cong., 2nd session, Survey of Public Lands within the Limits of Land Grants, etc., pp. 2 and 3, relating to the bill which became the act of 1910, 36 Stat. 834. Unsurveyed lands within railroad limits.

	Acres.
Atlantic and Pacific, now Santa Fe Pacific	5,406,584

The following table gives the area of unsurveyed railroad lands by States:

Arizona	5,044,740

"It is deemed wise and important that these lands be surveyed as promptly as possible for various reasons—first, that they may become taxable by the States and communities; second, that the Government may dispose of its lands which join the railroad lands, and in order that where the railroad lands occur within forest reserves—about 3,000,000 acres—of the unsurveyed lands being in reserves—the government officials may be able to determine the boundaries of the public lands for the purpose of regulating and controlling the same, selling the timber, etc.

"There is appended hereto and made a part of this report two letters from the Interior Department in regard to the proposed legislation."

Department of the Interior,
Washington, February 10, 1910.

Hon. F. W. Mondell,
Chairman Committee on the Public Lands,
House of Representatives.

My dear Mr. Mondell:

As requested by the Committee on the Public Lands, I have the honor to transmit herewith table showing the dates of the various granting and other acts relating to the Northern Pacific, Southern Pacific, Central Pacific, California and Oregon, Union Pacific, and Atlantic and Pacific railroads, together with a statement of the areas of the grants, the unsurveyed lands within the grant limits, and the unsurveyed lands within the grants lying within national forests. [104]

I have had the railroad division of the General Land Office, which is charged with the adjustment of these grants, examine the acts in question and attach their memorandum to the effect that there is nothing in any of the grants which will prevent such lands from being taxed under the provisions of the act of July 10, 1886 (24 Stat., 143), upon their being surveyed. The cases of Central Pacific v. Nevada (162 U. S. 512) and Northern Pacific v. Myers (172 U. S. 589) are cited in this connection.

The act of July 2, 1864, granting lands to the Union Pacific, Central Pacific, and Western

Pacific railroads, section 21 (13 Stat., 356-365), expressly requires that before any land granted is conveyed to any of said companies, they must first pay the cost of surveying, selecting, and conveying the lands. It would appear, therefore, that so far as these grants are concerned, payment for surveying being a condition of the grant, a failure to comply with that condition would warrant the declaration of a forfeiture in the event of the refusal to comply with that condition.

The other grants do not appear to have contained this language; but the sundry civil act of July 15, 1870 (16 Stat., 305-306), made the same requirement of the Northern Pacific Railroad, and the act of July 31, 1876 (19 Stat., 102-121), makes the same requirement as to all railroad companies to which lands had been granted, except to those companies exempted by law from such payments. As above stated, none of the companies here involved were so exempt.

There may be a question as to the right to declare a forfeiture against the companies upon which no such condition was imposed in the original grant; but attention is directed to the fact that Congress has subsequently imposed the condition as a prerequisite to conveyance of title, and its right so to do has, so far as I can learn, never been successfully questioned. Surely the Government of the United States

is not powerless to cause, through appropriate judicial proceedings, the restoration of the granted lands to the public domain if the companies shall refuse to comply with the conditions imposed by Congress. As to the effect of the provisions of law requiring companies to make payments for surveying, etc., I direct attention to the cases of Railway Co. v. Prescott (16 Wall., 803), Railway Co. v. McShane (22 Wall., 444), and the Northern Pacific Railroad Co. v. Traill County (115 U. S., 600), [105] the latter case containing an expression which indicates that Congress has the power to declare forfeiture——

> "The remedy lies with Congress and is of easy application. If that body will take steps to enforce its lien for these costs of survey by sale of the lands or by forfeiture of title, the Treasury of the United States would soon be reimbursed * * *"

It has been suggested that the period of thirty days allowed the companies in section 2 of the bill to deposit the moneys for surveying is too short; also that some provision should be made, probably in section 1 of the bill, for the return of any excess of deposits which may remain after all surveys have been made and the grants adjusted. The Secretary authorizes me to say that he has no objection to amendments of the bill in these particulars.

The General Land Office is preparing the statement asked for, showing the area of unsurveyed railroad lands in each national forest, but informs me that it will take a week or more to compile the data.

Very respectfully,

E. C. FINNEY,

Assistant to the Secretary.

[106]

APPENDIX 10

Congressional Globe March 2, 1865, p. . Poston's account of the setting aside of the Walapai Reservation.

"* * * I called the confederated tribes of the Colorado in council together. The council was attended by the principal chiefs and head men of the Yumas, Mohaves, Yapapias, Hualapais, and Chemihuevis. These tribes have an aggregate of ten thousand souls living near the banks of the Colorado, from Fort Yuma to Fort Mojave.

* * * * * * *

"But as the representative of the Government of the United States at that time, I did not undertake to make a written treaty with these Indians, because I considered that the Government was able and willing to treat them fairly and honestly without entering into the form of

a written treaty, which has been heretofore so severely criticised in both Houses of Congress, and with some reason. These Indians there assembled were willing, for a small amount of beef and flour, to have signed any treaty which it had been my pleasure to write. I simply proposed to them that for all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States, they should abandon that territory and confine themselves to the elbow in the Colorado river, not more than seventy-five thousand acres. But I did not enter into any obligation on account of the United States to furnish them with seeds and agricultural implements. I simply told them that if I was elected to represent that Territory in this Congress I would endeavor to lay their claims before the Government, which they understood to be magnanimous, and that I hoped that this Congress would have the generosity and the justice to provide for these Indians, who have been robbed of their lands and their means of subsistence, and that they may be allowed to live there where they have always made their homes. They desire to live as do the Pueblo Indians of New Mexico and Arizona. These Pueblo Indians live in settlements, in towns, in reservations, according to the wise policy of the Spanish Government, which colonized the Indians in reservations and made their labor valuable in

building improvements for their own sustenance, for churches, and public improvements, and in that manner made them peaceable Indians, instead of having everlasting and eternal war with the people whom they had robbed of their land.

"These people having been citizens of the Mexican Government, are not, according to our theory, entitled to any right in the soil; and therefore no treaty with these Indians for the extinction of their title to the soil would be recognized by this Government. It is a fiction of law which these Indians, in their ignorance, are not able to understand." [107]

[Endorsed]: Motion to Dismiss and Memorandum of Authorities. Filed Mar. 31, 1938. [108]

[EXCERPTS FROM BRIEF OF DEFENDANT SANTA FE PACIFIC RAILROAD COMPANY IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT.]

PART I

THE WALAPAI HAVE NEVER BEEN ACCORDED ANY POSSESSORY RIGHT IN THE LANDS INVOLVED UNDER THE POLICY AND LAWS OF THE UNITED STATES

* * * * * * *

B. The Walapai Were Disunited Bands of Non-agricultural, Nomadic Savages Who Occupied Exclusively No Definable Territory and No Place or Places for Any Great Length of Time

The Walapai made their debut in white history in Father Garces' Diary. He found them in 1776 near the site of Kingman, eating food and wearing clothes characteristic of wild nomads; but other Indians, not Walapai, were to the East. Another group of Indians, called Yabipai (W. P.,* 4-6), was found where the 1883 reservation was subsequently located. (Ibid., 6-11.) Garces later reports that from Diamond Creek, on the subsequently established reservation, to the Black Mountains, a stretch

*The letters W. P. are used herein as an abbreviated reference to Walapai Papers, Senate Document 273, 74th Congress, 2nd Session.

of country in the northwest portion of that here in issue, Yabipai-Cuercomaches were found (see Appendix 1, Points and Authorities). Pedro Font, who drew a map in 1777 and was an intimate of Garces, showed Yavapai north of Walapai (see Appendix 2, Points and Authorities). The Eighteenth Annual Report of the Bureau of Ethnology places Walapai where Font placed some, at least, of the Yavapai (see Appendix 3, Points and Authorities). The American Bureau showed that Walapai inhabited lands south and west of the 1883 reservation, but were on the lands that became the reservation very slightly, if at all.

Seviches, Yavapai, and Apaches were all over the territory here at issue in historic times, as indicated by sources mentioned in the Points and Authorities. Lieutenant Wheeler reported that Walapai were wild and roving, and that their life had carried them "beyond the notion of anything like order even among their own people." Major Price stated they had no tribal cohesion, appearing in independent bands in their hostility to the settlers.

The Walapai were, in short, disunited bands of non-agricultural, nomadic savages who occupied exclusively no definable territory and no place or places for any great length of time. They were wanderers in a land of other wanderers with whom, as between various Walapai bands, there was competition for food and water which accentuated, for

the competitively unsuccessful at least, the necessity, already imposed by a barren country, of continuous and far-flung searchings for the necessities of life. They were thus true to the shifting pattern found generally prevalent in the Southwest by Mr. Bandelier in his studies carried on from 1880 to 1885 (see Appendix 6, Points and Authorities).

* * * * * * *

D. No Soil Right Was Recognized in the Walapai.

These lands came from Mexico in 1848 by the treaty of Guadalupe Hidalgo (9 Stat. 922). By Article IX, Mexicans remaining in the ceded territory were to be admitted to United States citizenship, and to be "maintained and protected in the free enjoyment of their liberty and property." Article XI reads in part as follows:

> "Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall

> be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens." (p. 930.)

The Walapai, or the bands of Walapai, were of the savage tribes referred to in Article XI. They enjoyed no Mexican grants such as were held by the Pueblos of New Mexico. The contrast between Article XI, indubitably including Walapai among the savages to be controlled and, if need be, removed, and the references of Article IX to the status of Mexican citizens and the protection of their property rights, is persuasive that the Walapai were not referred to in Article IX. They were not affected by it in property right, or by the principle of our law which protects private rights in acquired territory, because they enjoyed no property right whatsoever under either Spain or Mexico.

The applicable laws of Spain and Mexico are known to the Court as a part of our domestic law. Their detail was so fully set up by the United States in its brief in Pueblo of Santa Rosa vs. Fall, No. 4298, in the Court of Appeals of the District of Columbia, involving the Papagoes, that defendant adopts such presentation as its own, and attaches the appropriate excerpts hereto as its Exhibit I. The conclusion of the detailed presentation is the same conclusion repeatedly stressed in the reports transmitted by the President to the Congress, and

in other official reports and documents, and crystallized in a long course of legislative and administrative actions: in the territory ceded by Mexico, Indians without formal Spanish or Mexican grants were without soil right which the United States was required to, or should, respect.

One of the first reports was that of William Carey Jones in the early 50's, on California titles. Spanish and Mexican titles were held only by formal grants; "In the wild or wandering tribes the Spanish law does not recognize any title whatsoever." A large number of treaties negotiated with California Indian tribes, whose areas of exclusive factual dominion were well marked, were refused ratification because the Indians had no legal right under Spain and Mexico, and because the United States acquired the soil free of Indian right. The reason for this action was reiterated as public policy year after year in the reports transmitted to Congress by the President (See Points and Authorities, pp. 7-9). It was the principle motivating legislation and administration. In the words of the Bureau of American Ethnology, the United States assumed title to all lands from the Rio Grande to the Colorado. The same obvious conclusion is drawn in IV Kappler, Indian Affairs, Laws and Treaties, Senate Document 53, 70th Cong. (1929), 1170-71. The present Commissioner of Indian Affairs, the Department of Justice, and the President have continued this policy and declined to establish any

precedent which would undo it or destroy its results (Appendix 7, Points and Authorities).

In Hayt v. United States and the Utah Indians, 38 Ct. Cl. 455, the Court of Claims says:

> "But as for Mexico, neither the researches of counsel nor the investigations of the court disclose recognition of aboriginal title by that Government. When the independence of Mexico was established in 1821 the revolutionary government adopted a decree known as the 'Plan of Iguala.' This plan was reaffirmed by the treaty of Cordova and its principles were adopted by the Mexican Congress under enactments in 1822 and 1823. By this plan it was declared that 'All the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this Monarchy, with a right to be employed in any post, according to their merit and virtues.' Under these declarations the civilized Indians of Mexico have enjoyed political rights. And it is interesting to note in this connection that Juarez, who came to the presidency of the Mexican Republic, was a full-blooded Indian. So far as the wild tribes are concerned they do not seem to have had reservations set apart to them, but they remained in Mexico without molestation because no doubt they were too numerous to be expelled and yet too uncivilized to be incorporated in the body politic.

"No account seems to have been taken of them in the settlement schemes of Mexico. By the first colonization law there it was provided 'that the lands of the Government which are not the property of any individual, corporation, or town are the subject of the law and may be colonized.' (Sec. 27, Law of 1824, Rockwell's Span. and Mex. Law, 451; United States v. Ballejos, 1 Black, 541.) In Chihuahua, where the Apaches, Ute and Navajo Indians resided, colonization was provided for a large portion, if not all, of what now comprises New Mexico and Colorado. This was in 1825, and no reference was then made to Indian titles. (Reynolds's Span. and Mex. Laws, 132.) So, in the colonization scheme provided by Sonora, it appears that 'there are colonizable in the State all the desert and vacant lands on its frontiers which belong to it and are not the property of an individual, corporation, or town." (Ibid., 296.)

"The Supreme Court of the United States has taken judicial notice of the status of the civilized Indians in New Mexico. (United States v. Ritchie, 17 How., 156; United States v. Joseph, supra.) But the status of the uncivilized tribes was not considered in those cases.

"The right to remove Indians from any portion of the ceded territory was recognized by

the twelfth article of the treaty of Guadalupe Hidalgo. (9 Stat. L., 930.) By a treaty made between the United States and the Navajos those Indians came under the exclusive jurisdiction and protection of the United States, and the laws regulating trade and intercourse with the United States were extended over the Navajo country. A similar treaty with the Utahs was likewise proclaimed September 9, 1850. (9 Stat. L., 984.) By its fourth article the territory occupied by the Utahs was annexed to New Mexico and the trade and intercourse laws extended over them. Free passage through territory occupied by them was provided for, and there was a stipulation to the effect that the United States should at their earliest convenience designate, settle, and adjust the territorial boundaries of the tribe; but in the meantime, by article 7, the tribe was not permitted to depart from their 'accustomed homes' unless specifically permitted, and the Utahs agreed to confine themselves strictly to such limits as might thereafter be assigned to them by the United States. There was neither recognition of title in the soil nor was there denial of any such claim, if any existed. Apparently the promise to fix boundaries was left open to be claimed as a right by the one party or to be fixed as a matter of grace by the other.

"By the treaty of October 7, 1863 (13 Stat. L., 673) with the Tabeguache band of Indians—the same who committed this depredation—a definite claim was asserted, as appears from the preamble, to wit:

> "'Whereas the Tabeguache band of Utah Indians claim an exclusive right to the following described country as their lands and hunting grounds within the territory of the United States of America, being bounded and described as follows, to wit: Beginning on the thirty-seventh degree of north latitude,' etc.

"But the Senate of the United States inserted an amendment after the word 'claim,' so as to make the same read, 'As against all other Indian tribes.' Another amendment provided that nothing contained in the treaty should be construed or taken to admit on the part of the United States any other or greater title or interest in the lands excepted and reserved in said tribe or band of Indians than existed in them on the acquisition of said territory from Mexico by the laws thereof

"Under an act entitled 'An act to vacate and sell the present Indian reservations in Utah Territory and to settle the Indians of said Territory in the Uinta Valley,' approved May 5, 1864 (13 Stat. L., 63), Congress re-

quired the special reservations theretofore made or occupied as such in Utah, excepting Uinta Valley, to be surveyed into tracts so that all or as many of the Indians there as practicable should be removed to the valley, which by the act was set apart for the permanent settlement of such of the different tribes of Utah as might be induced to occupy the same. The act of February 23, 1865 (13 Stat. L., 432), relates to the lands described in the act of 1864 as far as we are able to determine.

"The lands mentioned in the act of May 5, 1864, were restored to the public domain by a subsequent act approved June 18, 1878. (20 Stat. L., 165.)

"By the treaty of 1868 the United States fixed the boundaries of the country of the other Utahs. By this treaty seven bands relinquished all claims and rights in and to any portion of the United States not embraced in reservations defined by the treaty. (15 Stat. L., 620.)

"Considering that by the first treaty with the Tabeguache band rights of occupancy were left indeterminate, that by the next agreement the treaty-ratifying power declined to recognize the Utahs as possessing any primary title, but expressly refused to admit any other or greater title or interest in the lands excepted and reserved to the tribe than existed in them on the acquisition of the country from Mexico by

the laws thereof, it does not sufficiently appear that the depredating tribe was occupying country to which they had a possessory right and title at the time of this depredation. The rule fixed by the political department of the Government in such a matter must be the rule to be followed by the judicial department. There was no special country set apart for the use of the Utahs before the treaty of 1863, and that treaty must be viewed as giving the band a country—limited by reservation boundaries—never before possessed by this band. It became Indian country when the United States set apart a reservation, and not until then, and to the extent of the reservations assigned to them only. The court must conform its will to that of the parties. If they did not stipulate for boundaries and an Indian country within limits at the outset, it is not the province of the court to define the limits of such a country now.

"No definition of Ute country appears prior to this treaty of 1863. The lands then assigned did not extend south of the thirty-seventh degree of north latitude, which was the southern boundary of Colorado. Title then, as it already appears, to lands north of that parallel was recognized in favor of that aboriginal band 'as against all other Indian tribes,' but not admitted as against the United States. None of the tribes acquired with the cession of territory

under the treaty of Guadalupe Hidalgo have ever been called upon to surrender any part of the country inhabited by them except the Tabeguache band. All but this band were removed at the pleasure of the Government. Nothing is disclosed by the record to establish any higher or greater title in this inconsiderable band than existed in the other Utahs, the various tribes of Apaches, and the Navajos.

"We are constrained to hold that with the acquisition of territory from Mexico the treaty-making power intended to Americanize the ceded territory and that the doors were not opened by the political department of the Government for Indians to commit depredations on the people who were there or upon those who might go there. The only rational view to take of the matter is that that country became Indian country only where the Indians had the exclusive right of occupancy. The defendant Indians did not have that right at the time of the commission of this depredation. Plaintiff's intestate was lawfully there."

Attention is called to the fact that the amendment to the Ute treaty occurred just prior to the statutory creation of a reservation for the Walapai, well beyond any lands in this litigation, and just prior to defendant's grant. The Hayt decision, and the history it relates, is conclusive confirmation of the whole tenor of public policy from 1848 to 1938;

Indians, including Walapai, had no rights unless from Mexican grants or United States reservations, in the territory acquired in 1848.

* * * * * *

APPENDIX

In the Court of Appeals
District of Columbia
No. 4298

THE PUEBLO OF SANTA ROSA,

Appellant,

vs.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY, Commissioner of the General Land Office,

Appellees.

EXCERPTS FROM "BRIEF OF APPELLEES"

pp. 120-122

It should be noticed, however, that in many cases arising prior to 1853, Mexican grants had *uniformly been disallowed* by the Supreme Court if it did not appear that they had been

> "deposited and recorded in the proper public office among the public archives of the Republic".
>
> Berreysea v. U. S. 154 U. S. 623.

Citing:

U. S. v. Cambuston, 20 How. 59, 64.
U. S. v. Castro, 24 How. 346, 349.
U. S. v. Knight, 1 Black. 227, 251.
Peralta v. U. S. 3 Wall. 437, 440.

Speaking of a Mexican grant, the court also says:

"Where the petition and the other requirements following it have not been registered in the proper office with the grant itself, a presumption arises *against its genuineness, making it a proper subject of inquiry before that fact can be admitted. It is not to be taken as a matter of course; nor should slight testimony be allowed to remove the presumption.*"

Fuentes v. U. S. 22 How. 443, 454.

In the Castro case, supra (p. 349), it is said:

"The grants of portions of the public domain in Mexico, the mode of obtaining them, and the officers by whom they were to be issued, and the conditions to be annexed to them, were with *great precision regulated by law.* * * * It is sufficient to say that it was required to be in writing, the officers and tribunals before which it was to pass designated and every step in the process from the petition of the party to the final consummation of the title was not only required to be in writing, but also to be deposited and recorded in the proper public office among the public archives of the Republic."

On page 350 the same case says that, to maintain a title by secondary evidence, the claimant must show, (1) that the grant was legally made and recorded; (2) that the record has been lost or destroyed, and

> (3) "He must support this proof by showing that within a reasonable time after the grant was made there was a judicial survey of the land and actual possession by him by acts of ownership exercised over it."

After stating that without a survey and possession the authenticity of the grant would have nothing to support it but parol testimony, the court continues:

> "We find nothing in the history of *Mexican jurisprudence* or Mexican grants which would justify this Court in supporting a Mexican title made out by such testimony only, *or by secondary evidence* of any kind short of that above stated."

In the Peralta case, supra, the court says (p. 440):

> "The Mexican nation *attached a great deal of form* to the disposition of its lands and required many things to be done before the proceedings could ripen into a grant. But the important fact to be noticed is that *a record was required to be kept of whatever was done.* This record was a guard against fraud and imposi-

tion, and enabled the government to ascertain with accuracy *what portions of the public lands had been alienated. The record was the grant and without it the title was not divested.*"

(It will be noticed that all the above, to which much more might be added from other decisions, is exactly in line with our contention that plaintiff has neither legal existence nor title unless recognized as a pueblo by Spain or Mexico, with record evidence of such recognition, followed by the designation and marking out on the ground of the land given it as such pueblo. This matter will be taken up and supported by Supreme Court decisions later.) The entire drift of Supreme Court opinions is that, even under the treaty of 1848, with its exceedingly wide recognition of pre-existing titles of the loosest sort, regard must be had to the well-known insistence upon form characteristic of the Spanish and Mexican governments, and that loose pretensions to large and indefinite areas of land should not be sustained without archive evidence, as well as exact proof of possession and survey. Since this was true prior to the Gadsden Treaty, a stricter rule was necessarily enforced thereafter, and courts are precluded from recognizing pretended titles which have neither been "located" by definite demarcation on the ground, nor recorded in the archives by at least a minute, showing the recognition of plaintiff as a community.

pp. 125-145

Under the laws of Spain and Mexico, plaintiff could not be a legal entity capable of owning land without recognition as such by the government. No such recognition is shown.

The Spanish and Mexican theory of land tenure and of Indian rights thereunder is, in barest outline, as follows:

Upon the conquest, the lands of Mexico, whether occupied by Indians or not, became the individual property of the King of Spain, partly by virtue of the Papal Bull, and still more by right of discovery and seizure. It followed that no private land title could thereafter exist unless it emanated from the Crown. This, of course, required some affirmative act of recognition by the King or his delegates. The sale of these Crown lands constituted a valuable source of revenue; they were, therefore, a treasury asset, and for that, as well as other reasons, were imprescriptible. The original Indian inhabitants were treated not only as persons non sui juris, but as inferior beings. They were parceled out among the Spaniards to perform forced labor for their masters (encomiendas). They were removed from their original homes and concentrated in villages (reducciones) at the royal pleasure for convenience in governing and Christianizing them, and were subject to all sorts of restrictions not applied to Spaniards. (It is noteworthy that the Visitador-General of Spain twice recommended that the Papa-

gos themselves should be transplanted from their original homes to other places; Tr. p. 223.) Some of these disabilities were later modified but "the disposition first announced, that of direct vassalage, remained a fixed dogma of Spanish-American law." (Tr. p. 225.) And the above system and status, although theoretically ended by Mexican independence, yet, in fact, persisted long after that time. Since, however, Indians were numerous and Spaniards few, and, since the land and mines could be effectively developed and revenue produced only by Indian labor, the home government, as a matter of policy, was sedulous to preserve the Indians, prevent them from revolting and keep them reasonably satisfied. Hence, the King issued a large number of decrees forbidding molestation of them by private persons, and requiring that they be given or left with enough land for their support, with much more of similar import. *None of these enactments was self operative.* Title accrued only when a specific grant was made to an individual or when an Indian village was created or officially recognized as a community and an allotment of land made for its use. The above decrees ordered that *the fact of Indian possession should be respected and that grants should be made where necessary, but conferred no permanent right or immunity as against the Crown, nor conveyed title from the Crown.*

When Mexico gained its independence, Indians became citizens, sui juris, and could obtain land titles

under the colonization laws like anyone else; but their limited rights to the soil, as previously existing, were in no way enlarged. Under both governments the Indian right, *unless created or supported by official act,* was possessory only and defeasible at the will of King or State. *Under both governments formal recognition by the authorities was necessary before an Indian village acquired the status of a municipal entity, or entity of any kind.* It also had to have a church, and a slight, but definite municipal organization. *It was also necessary that a definite tract of land should be designated and measured off as the communal property.* Without these things there was no entity and no title. *Even with these things no municipal entity, Spanish or Indian, ever acquired the fee title or any title that was not still subject to the control of the Government.*

As against this, appellant's theory seems to be that Aztec titles, existing at the time of the conquest, were acknowledged by Spain and confirmed by the general enactments for Indian protection above noticed; and that, by virtue thereof, an Indian village of immemorial existence and permanency ipso facto had fee title to the land it occupied, even if it consisted of no more than two families, and had no governmental recognition whatsoever.

It would be sufficient answer to say that appellant here does not meet even its own requirements, since there is not a particle of proof that the alleged pueblo existed at all or possessed any land whatever in Spanish days. There is no proof as to how long

it existed in Mexican times, nor what land it then possessed, even if it were possible to identify plaintiff with the "Santa Rosa" of 1850.

However, we proceed with all possible brevity to show that appellant's theory of law is itself unfounded.

1. *The land of the new world upon the conquest was held to be the sole and absolute property in fee of the King of Spain.*

This was partly due to the bull of Pope Alexander VI (Hall, Mexican Law, Secs. 1, 2), but the real source of title was the discovery and conquest of America.

> "While the different nations of Europe respected the rights of the natives as occupants, *they asserted the ultimate dominion to be in themselves;* and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grants subject only to the Indian right of occupancy. The history of America from its discovery to the present day proves, we think, the universal recognition of these principles. *Spain did not rest her title solely on the grant of the Pope.* Her discussions respecting boundary with France, with Great Britain, and with the United States, *all show that she placed it on the rights given by discovery.*"
>
> Johnson v. McIntosh, 8 Wheat. 543, 574.

"Although the conquest be made by subjects of their own motion and at their own expense, the provinces, lands, towns and *real property belong to the crown.*"

Solorzano, Politica Indiana, Book 1, Chap. 9, Sec. 16.

"The justice and legitimacy of the *supreme dominion* established by the Spanish Kings *over lands inhabited by Indians* at the time of their discovery may be based upon the fact that, when discovered, the Indians were so barbarous and uncivilized that they hardly deserved the name of men and were, therefore, in need of someone to govern, protect, educate and civilize them and render them capable of receiving the Christian faith and religion."

Ibid. Sec. 19.

Since we will have occasion to cite this authority again, we append the following

"The great authority on the laws of the Indies is Pereyra y Solorzano, Jurisconsult, who was a public attorney and judge in the Indies, and a member of the Council of the Indies."

Walton, Civil Law in Spain and Spanish America, p. 521.

Solorzano is also quoted as an authority in White's New Recopilacion, Vol. 1, pp. 367-372; Vol. 2, p. 103, and by the Supreme Court in Chouteau v. Maloney, 16 How. 203, 237, 239.

A striking announcement of the same doctrine is found in Book 4, Title 12, Law 14, of the laws of the Indies quoted in 2 White Recop., p. 52, and commencing:

> "*Whereas, we have fully inherited the dominion of the Indies; and whereas the waste lands and soil which were not granted by the Kings our predecessors, or by ourselves, in our name, belong to our patrimony and royal crown,* it is expedient that all the land which is held without justice and true title be restored as belonging to us", etc.

This law will be more fully examined later on, and is discussed by Garza-Aldape (Appendix, p. 185).

Much more to the same effect might be added, as, for example, Solorzano, Pol. Ind. Book 1, Chap. 9, Secs. 14, 20, 25-32; Book 11, Chap. 10, Sec. 1; also Wistana Luis Orozco, Legislacion y Jurisprudencia Sobre Terrenos Baldios, mentioned as authority by Aldape, who says (Vol. 2, p. 765) referring to the Royal Cedula of November 10, 1591:

> "The royal cedula cited established the legal principle that all the conquered lands belonged in full dominion to the royal crown of Spain,—an arbitrary disposal which deprived, with the solemnity of a royal decree, the ancient inhabitants of the country of the legitimate property rights and titles they enjoyed over the soil."

Again, after quoting the law of November 20, 1578, and that found in Book 4, Title 12, Law 14, of the Recopilacion, partly quoted above, he says:

> "In the Spanish legislation, we find the compiled laws (Title 12, Book 7, Novissima Recopilacion * * * in which is found clearly expressed the supreme and original lordship of the State over the Spanish soil."

2. *The necessary result of the foregoing is that after the conquest no private land titles could exist unless they emanated from the Crown.*

It is true that the fact of Indian possession remained, but it was a possession by grace and tolerance. In flat contradiction to appellant's theory that the pre-existing Indian rights or titles persisted, Orozco says (Vol. 2, p. 767):

> "This validity was never recognized in the case of the titles issued by the native authority of Anahuac (Mexico), as is easy to understand, considering the nature of the conquest, as well as the context of the royal cedula transmitted to Cortez through the medium of the viceroy, Don Antonion Mendoza, issued at Madrid on the 2nd of October, 1525."

To the same effect see,

Orozco, Vol. 2, p. 902.

Francisco de la Maza, Codigo de Colonizacion y Terrenos Baldios, p. 6.

Again,

> "We find that our royal Kings hold this right in the Indies; wherefore, *with the exception of*

such lands as he may have graciously granted to cities, towns, villages, other communities, or private persons, all the rest, and especially all that is uncultivated, does and should belong to his crown and dominion, to be held as despotically and absolutely as we know they were held by the Montezumas in New Spain, by the Incas in Peru, and by the Caciques in other parts of the Indies."

Solorzano, Pol. Ind., Book 6, Chap. 12, Par. 3.
Ibid., Book 2, Chap. 24, Secs. 41, 42.

It is unnecessary to accumulate Spanish authorities to this effect, because the principle that titles in Mexico could exist only by royal grant, and that such grants were made without regard to Indian occupancy, is authoritatively established by our Supreme Court.

3. *Supreme Court decisions holding that Indians had an occupancy right only, and that Spain could and would convey land in the occupancy of Indians, authoritatively prove both of the preceding points.*

The leading case of Johnson v. McIntosh, 8 Wheat. 543, 573-4, 586, 590, 602, has already been cited. The Court's attention is respectfully called to the whole decision, especially to the pages above designated.

In Marsh v. Brooks, 14 How, 513, 521, speaking of Spanish usage in Louisiana, it is said:

"The Indians were kept quiet and at peace with Spanish subjects by kind treatment, and due precautions which did not allow obtrusion

on lands claimed by them without written permits from the governor, *but that such permits were usual cannot be doubted.*"

Later, in speaking of a cession from Indian tribes to the United States of a stretch of territory, the Court says:

"Within which cession lay a great mass of Spanish orders of survey and grants in regard to which this country has been legislating and adjudicating for nearly fifty years without any one ever supposing that such concessions were affected by the loose Indian pretensions set up to the country at a time when the concessions were made; *pretentions that the Spanish government notoriously disregarded, further than a cautious policy required*" (p. 522).

Quotations might be multiplied indefinitely. The following cases fully establish our position:

Cherokee Nation v. Georgia, 5 Pet. 1, 17, 47.
U. S. v. Fernandez, 10 Pet. 303-4.
U. S. v. Rogers, 4 How. 567, 571-2.
U. S. v. Cervantes, 59 U. S. 553.
U. S. v. Cook, 86 U. S. 591, 593.
Beecher v. Wetherby, 95 U. S. 517, 525.
U. S. v. Kagama, 118 U. S. 375, 381.
Buttz v. Northern Pacific R. R., 119 U. S. 55, 66-7-8.
Spalding v. Chandler, 160 U. S. 394, 402-3.

Appellant cites numerous Spanish laws for the protection of Indians in their possessions. These are

merely an expression of the "cautious policy" mentioned in *Marsh v. Brooks, supra, and amount to nothing more than a preservation of the occupancy fact or right only.* Time does not permit the examination of them in detail, but the closer the scrutiny the Court is able to give them, the more convinced will it be that this is their purpose and limit. This also is authoritatively shown by the above Supreme Court decisions, which coincide with, and doubtless in part follow, various Spanish and Mexican enactments showing Indian occupancy to be subject to the control and disposition of the government. For example:

(a) The decree found in 2 White, Recop. p. 48 Recop. de las Indias, Book 4, Tit. 7, Law 23), where the King, while requiring all possible forbearance on the part of Spaniards making settlements among Indians, says:

> "And, if, nevertheless, they do withhold their consent, the settlers * * * shall proceed to make their settlements without taking anything that may belong to the Indians, and without doing them any greater damage than necessary for the protection of the settlers and to remove obstacles to the settlement."

Clearly, the settlers could not establish their community or town without, to some extent, dislodging the Indians, and the King, by this law, delegates to such settlers a portion of his right to extinguish the Indian possession.

(b) The Royal Ordinance found in 2 White Recop., pp. 70, 72, for the promotion of the cul-

tivation of cochineal, flax and hemp, provides for a distribution of lands among Indians, and says:

> "For my royal pleasure is that all said natives may own a competent amount of real property, and that the lands which shall be distributed for the aforesaid objects * * * may belong to these individuals to whom they shall have been *allotted*, whether they be Indians or belong to other classes, together with the necessary right of property; *retaining always the right reserved to my royal crown and to the public dominions respectively.*"

If any of the allottees fail to improve the lands, "*The same shall be taken from them* (which I command to be done without mercy) and granted to others who shall fulfill the conditions" (p. 71).

This enactment, like many others, instructs the Viceroy to make grants to Indians in proper cases, and doubtless many such grants were made. It also shows that even the grant to Indians was conditional. Without a grant, there was nothing but a general rule of protection of Indian occupancy.

(c) The circular of instructions issued by President Juarez of Mexico in 1867 (Hall's Mexican Law, Secs. 645-649) requiring that, when public lands are adjudicated, care must be taken to avoid injury to third parties, states that

> "such injury does not exist, strictly speaking, in respect to the lands which are in possession

> of the Indians *when they lack their respective title given by competent authority*".

Its requirement that the Indians appear and solicit title to the lands they possess,

> "under the conception that said title be issued to them gratis, *the property being thus legitimized which might otherwise be claimed*",

although referring to the situation created by the disamortization law of 1856, whereby Indian pueblos theretofore officially recognized were extinguished and the property escheated to the State, yet expresses the general idea of Mexican law, disallowing any right of Indian possession not based on formal title. (Estanol, Tr. pp. 415, 416, 419, 420; Garza-Aldape, Appendix, pp. 191, 196.)

(d) An assertion of the same principle was made by the Commission which in 1815 examined the famous Apelousas County claims in Louisiana. Appellant's exact contention that the Indian title was the best of all titles because the orginal property of the soil was in them and that it was held sacred by Spain after the conquest, was there urged, but the Commission decided that Spain "recognized no title in them (the Indians) independently of that derived from the Crown—a mere right of occupancy at the will of our government." (p. 252.)

2 White Recop., pp. 247-255.

Similarly as to titles in California after the treaty of 1848, "all lands in California *not included within*

the limits of grants, made in conformity to law and prior to July 7, 1846, formed a part of the public domain of Mexico."

Halleck's Report on California Land Titles, p. 15.

As to the settlement of agricultural Indians, "they have a *right of occupancy* in the land which they need and use".

Ibid., p. 113.

4. *The status of Indians as serfs and the practice of removing them to and concentrating them in settlements at the Government's pleasure are inconsistent with a recognition of indepedent land ownership, or any higher right than a possession subject to the control of the Government.*

This is a collateral matter, and, in view of the abundance of direct authority will not be dwelt on.

"The Indians, after the conquest, were at first slaves; they paid a capitation tax to the crown and their labor was entirely at the service of their lord. This system was modified from time to time, but all the changes carried into effect down to the revolution did not release them from their state of vassalage. They still continued liable in a greater or less degree to the performance of compulsory labor under the orders of persons against whom they had no portection."

Walton, Civil Law in Spain and Spanish America, pp. 521-2.

"The nature of the Indian is such that he is neither to be allowed complete freedom, nor is he to be condemned to complete servitude."

Solorzano, Pol. Ind., Book 2, Chap. 6, Sec. 45.

Notwithstanding the theoretical equaliy of Indians with other Mexican citizens after Mexican indepedence, they were still liable to forced labor. One of the regulations of Governer Figueroa of California dated August 9, 1834, says:

"Article 16. The emancipated Indians will be obliged to assist at the indispensable common labor, which, in the opinion of the governor, may be adjudged necessary for the cultivation of the vineyards", etc.

"Article 18. They (the Indians) cannot sell, burden or alienate under any pretext the lands which may be given them. Neither can they sell their cattle. Whatever contracts may be made against these orders shall be of no value. The Government will reclaim the property *as belonging to the nation*, and purchasers shall lose their money."

Halleck, California Land Titles, p. 44.

The regulations of Governor Alvarado, dated March 1, 1840, empowered the mayordomos.

"Article 6. To compel the Indians to assist in the labors of the community, chastising them moderately for the faults they may commit."

Ibid., p. 52.

There is much more to the same effect in these and similar governmental regulations in California.

As already noted, there was no doubt in the minds of the Spanish authorities of their right to remove the Papagos from their lands and locate them elsewhere, and the Visitador-General twice so suggested. (Tr. p. 223.)

As to reducciones, whereby Indians were concentrated into towns, we find "laws were provided for the *founding* of Indian pueblos or designating the customs they were to have, and limits and privileges". After citing the law on the subject, "It provides that the Indians shall be reduced to pueblos, and that they should not live separated in the mountains, depriving themselves of all spiritual and temporal benefits." (Hall, Mex. Law, Sec. 154, et seq.)

The reducciones were the first examples of establishment or recognition of Indian pueblos as entities. They were the first Indian pueblos in the technical sense of the term, namely, a village recognized by the Government as a municipal entity, and not a mere collection of houses. Later, other Indian villages besides the compulsory settlements called reducciones were recognized, organized and given allotments of land. In both cases, however, it is clear that a certain definite although slight organization, was required.

> "We order that in each town and reduccion, there shall be an Indian Magistrate (alcalde) of said reduccion, and if it exceeds eighty houses, two alcaldes and two councilmen (regidores); likewise Indians * * * all of whom are

to be elected annually in the presence of the curates, as is customary in Spain and Indian towns." (Recop. de las Indias, Book 6, Tit. 3, Law 15.)

"The only jurisdiction which the Indian magistrate shall have shall be to examine, arrest and take delinquents to the prison of the Spanish town in the District." (Ibid. Law 16.)

A vast number of other regulations, far too numerous to mention, were also made to govern reducciones.

Since the Christianization of the Indians was considered of primary importance, a church was essential to the existence of a recognized Indian pueblo (Recop. de las Indias, Book 6, Tit. 3, Law 4), and the church was the center from which measurement of the fundo legal (townsite) and the ejidos (commons) was made. (Hall, Mex. Law, Secs. 162, 153.)

There is no shadow of proof of the existence of alcaldes or regidores in any Papago community, either in ancient or modern times, nor of annual elections, nor of a church until very recently, nor of a fundo legal, nor of ejidos.

It thus appears that the Indians could be shifted at the pleasure of the State unless and until their community had been recognized as a pueblo and a definite grant of land made. Without such recognition, they had nothing but an insecure occupancy. When so recognized and endowed, a definite municipal and religious organization was effected. There

is not a vestige of proof either of recognition, grant, or organization in the case of any Papago village.

5. ***Formal creation and recognition of an Indian community by the authorities was necessary before it became a legal entity, followed by an allotment of land to it proportionate to its size and needs.***

(a) Appellant's theory to the contrary, of course is preposterous. It is absurd to suppose that Spain and Mexico, with their formal ideas of government, permitted the existence of an unknown but large number of *corporate entities, each owning an indefinite area of land*, without accurate knowledge as to which Indian settlements these were, or how many there were, or how much land they possessed. Not only would this be totally at variance with the most elementary ideas of a municipality as an agency and subdivision of government, ideas which Spain fully understood and recognized, but it would also make it impossible to tell at any time how much land was in private ownership and how much was public domain.

(b) Under appellant's theory, Spain would have relinquished from the very start a great proportion of the fruits of the conquest, and would have abandoned, without compensation, much of one of its principal sources of revenue, viz.: the sale of land.

(c) The testimony of Estanol and Aldape on this point is clear and unanimous. Both of these men are lawyers of long experience and high distinction, and familiar with the examination of titles. Estanol was acquainted with titles of Indian pueblos in Sonora. (Tr. pp. 416, 420.) Each had been Secre-

tary of the Interior in Mexico. It is impossible to take time even to summarize their evidence further than to say that Estanol stated that the word "pueblo" has in Spanish both a common and a technical meaning, the first signifying any city, town or village, and the second applied to an Indian community or town accepted by the Government as a legal entity. This required an official act without which the village was simply an aggregation of individuals without any legal status. Without formal official recognition, an Indian village in Sonora up to 1853 had no land title whatever, and could acquire none, because it had no legal entity, and even when recognized as an entity, governmental action was necessary to give it an allotment of land, with very much more to the same effect. All this was confirmed by Aldape. See especially Tr. pp. 412-416, 419, 421, and Appendix to this brief, passim.

It should be noted that the two meanings of "pueblo" are recognized by the Supreme Court when, after stating that there was a pueblo of some kind in Mexican days at San Francisco, it says:

> "We say a pueblo *of some kind*, for the term, which answers generally to the English word 'town' may designate a collection of individuals residing at a particular place, a settlement, or a village, or may be applied to a regular, organized municipality."
>
> Grisar v. McDowell, 73 U. S. 363, 372-3.

The court was here probably speaking of a pueblo of Mexicans, but the passage shows that a distinc-

tion between the common and technical meaning of the word, as testified to by our two Mexican experts, was a matter of judicial cognizance.

We need not rely on expert testimony, however, because in U. S. v. Santa Fe, 165 U. S. 675, 688, the Court says:

> "It may well also be implied from the provisions in the Recopilacion that the rights of the town to hold land for public purposes was *required to be evidenced by grant* from the viceroy or governor, and that such grant, when made, required confirmation by the Crown."

This was said of a Spanish community, but in U. S. v. Pico, 72 U. S. 536, 540, the Court, speaking of an Indian pueblo, said:

> "A pueblo *once formed and officially recognized* became entitled under the laws of Mexico to the use of certain lands for its benefit and the benefit of its inhabitants, and the lands were, *upon petition, set apart and assigned to it by the government.*"

We call special attention to these two cases, the first of which denied a pueblo claim resting on general law, without a grant; while the second, which is the only case found, unless the Faxon case, infra, expressly dealing with an Indian pueblo, shows the need of official recognition for the legal existence of a pueblo, and the need of petition and location before it became legally entitled even to the use of the land.

(d) All the foregoing is conclusively settled by the Supreme Court in

U. S. v. Pico, 72 U. S. 536, 540.
U. S. v. Cervantes, 18 How. 553, 555.
Grisar v. McDowell, 73 U. S. 363, 372-3.
U. S. v. Santa Fe, 165 U. S. 675, 688, 707-8-9, 713.
U. S. v. Sandoval, 167 U. S. 278, 296-7-8.
Rio Arriba Co. v. U. S. 167 U. S. 298, 307.
Townsend v. Greeley, 72 U. S. 326, 336.
Faxon v. U. S. 171 U. S. 244, 258.
U. S. v. Sandoval, 231 U. S. 28, 45.
Harrison v. Ulrichs, 39 Fed. 654, 663.

We mention, without discussion, two matters which are relevant to all stages of this controversy. The first is that the laws of Spain relative to the recognition and creation of Indian pueblos were carried over without change into the jurisprudence of Mexico, and remained in force until after 1853 (Estonal, Tr. pp. 411-12; Garza-Aldape, Appendix pp. 181-2). A general statement as to the retention of all laws of the pre-existing sovereignty is also found in Rockwell, Spanish and Mexican Law, pp. 17-18.

The other point is that, in any case of doubt as to the validity of land titles, the presumption was in favor of the government, just as is the case under our law.

> "There is another right belonging and reserved to our kings and sovereign lords by virtue of the supreme power which they have

over their realms, namely the right to all public lands, fields, pastures, rivers and waters. * * * When in any litigation question arises as to property in, or the right to, or the possession of, any of these things, *the King's right to the same is to be presumed as against all private persons who cannot incontinently show proper titles of ownership.*"

Solorzano, Pol. Ind., Book 6, Chap. 12, Sec. 17.

6. *Even after the formal creation of a pueblo and the allotment of land to it, neither Spanish nor Indian pueblos acquired the fee title.*

"The fee of the lands embraced within the limits of pueblos continued to remain in the sovereign and never in the pueblo as a corporate body."

U. S. v. Sandoval, 167 U. S. 278, 297.

"The disposition of the lands assigned was subject at all times to the control of the government of the country."

U. S. v. Pico, 72 U. S. 536, 540.

Townsend v. Greeley, 72 U. S. 326, 336-7.

Faxon v. U. S. 171 U. S. 244, 259.

The same principle is enunciated in many of the other cases cited in the list preceding.

The result of all the foregoing is that plaintiff, having no governmental recognition, was not an entity, could not own land, and of course had no land assigned to it at the only time when it could have acquired entity or title.

APPENDIX.

pp. 180-209.

The law of Spain, which in Indian matters remained practically unchanged during Mexican sovereignty up to 1853, applied to the territory in controversy when it became part of the United States under the Gadsden Purchase. It is, therefore, regarded as domestic and not foreign law and is the subject of judicial notice in American courts (Fremont v. U. S. 17 How. 541). Since, however, the principles and details of this law were not in fact known to the trial court, both sides produced witnesses to elucidate it. The testimony of two of these, Ygnacio Bonillas, on behalf of plaintiff, and Jorge Vera Estanol, on behalf of defendants, was taken by deposition without objection on the score that it was not properly evidentiary and is, therefore, incorporated as evidence in the transcript, pp. 115, 410. The other two experts appeared in person at the trial, where the court was willing to hear them, but declined to receive their remarks as evidence, although they were examined in open court by question and answer in the ordinary way. These were Toribio Esquivel Obregon on behalf of plaintiff, and Manuel Garza-Aldape on behalf of defendants (Tr. pp. 216, 274). Appellant having incorporated in its brief a portion of Obregon's testimony, appellees append for the information of the court a summary of portions of that of Garza-Aldape, and of the cross-examination of Obregon. Both are too lengthy to permit of complete reproduction.

MANUEL GARZA-ALDAPE.

Qualifications:

Spanish speaking native of Mexico; admitted to practice law in all courts of that Republic. Graduate of National School of Jurisprudence in 1893; practicing continuously in Mexico from 1893 to 1913; member of the National Congress of Mexico for ten years; Minister of Revenue and Gobernacion, corresponding more or less to the United States Department of the Interior, and occupant of other official positions, under the Huerta regime. Law practice in Mexico dealt a great deal with land titles; for last eight years advising on Latin-American matters in office of Curtis, Mallet-Prevost and Colt, New New City, a firm with offices or correspondents in every Latin-American country.

In my study and practice of law, I acquired knowledge of the laws governing the right or title of Indian villages in Mexico to the land they lived on, covering the law of Spain prior to Mexican independence and the Mexican law thereafter. Up to very recently the laws of Spain were in force in Federal matters relating to the creation, organization and legal essentials of pueblos among the Indians.

The word "pueblo" has two meanings. In a general sense it means people. Applied to Indian communities, it also has a technical meaning, viz.: a pueblo duly established or recognized by the authorities. In the technical sense the word "pueblo" never designated a municipality of Spaniards. Their

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communities were called ciudades, villas and lugares, meaning cities, villages and places. Up to 1853 in Mexico the technical names of a municipality of Indians was "pueblo", but that word in its ordinary non-legal sense might be applied either to an Indian or a Spanish village. A "rancheria" is a small rural community which has no entity or jurisdiction. Up to 1853 in Mexico, that word was never used to designate a legally recognized municipality.

Up to 1853, in order that an Indian community in Sonora might become a pueblo in the legal sense of the word, it was necessary to have an act by the proper authorities, the audiencia or governors, authorizing its foundation. After Mexican independence, the laws governing the organization of Indian villages were the same old laws. Mexico made no change in the laws of Spain that had previously governed the creation of Indian Pueblos, but after Mexican independence, the National Congress or the State Congress made the foundation. The fact that a number of Indians had always lived together in a certain place did not make the Indian community a legal entity under the laws of Spain or Mexico. It was necessary, in addition, to have an act founding the town and creating the legal entity. This might be the voluntary act of the Government or the result of an application by the Indians. The general practice of Spain was to center these Indians in towns to Christianize them. If there was no governmental act such as I have described, a community of

(Testimony of Manuel Garza-Aldape.)

Indians that had always lived in the same place had no legal status, and up to 1853 no smaller or less organized community than a pueblo was recognized as a legal entity among Indians. The Indian pueblo was a very rudimentary governmental agency with an alcalde and regiodores (councilmen) with jurisdiction over small police matters. Graver police matters or things requiring higher discretion than police matters were out of their jurisdiction, and they went to the Spanish authority.

If a community of Indians in Sonora had been living in the same place from time immemorial but without formal official recognition, such as I have mentioned, I don't see that it had any right or title to the land it occupied. Mere possession under the Spanish law did not ripen into title. There was no recognition by the government of Spain or Mexico of any right of occupancy in the Indians of a viliage because the elementary theory was that all the lands of Mexico belonged to the King. There were only two ways in which said lands could be divested from the Crown. One was a sale or grant by the King or his representatives. The other was "composition", which is a sort of settlement between the King and the possessors of lands with a paper title, by which they might pay for and acquire said lands.

Up to 1853 the fee title to lands given to an Indian community for the common use of the occupants was in the King, the pueblo having only the use and enjoyment. After the pueblo was recog-

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nized, its lands were of two kinds, "fundo legal" and "ejidos". The former was given for the purpose of distribution among the inhabitants for housing purposes. The latter were given for pasturage or other common use. The fee title of both kinds of land remained in the King, but the inhabitants would acquire fee title to lands and lots of the fundo legal, provided they built houses and remained on the land for four years. The ejidos could never be distributed. They were given for the common use of the people. If, however, the Indian village had not been recognized by the government at all, its status would not be apparent. The Indians would have nothing except a mere tenure of possession. If the pueblo had been recognized and established by the government, I think its usufructuary title was still subject to governmental control or disposition, but I do not remember any law which expressly decides that point. In the case of a village which had not been recognized by the government and merely had possession of the lands, the fee title belongs to the government which has all the rights. Several laws were enacted to allow them to hold title to such possessory lands if they did so and so; otherwise they would be expelled.

If an Indian pueblo was recognized or created as such by the government, a record would be made by giving it a charter which was kept in the archives of the Council of the Indies, and after the independence of Mexico, in the archives of the

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States. If a question arose as to whether an Indian community was a pueblo or not, the evidence produced to settle that question would be the charter.

Neither an Indian pueblo, nor anyone else, could acquire title by prescription against the government to the lands it occupied up to a very recent date. In 1863, a law was enacted in Mexico vacating the old laws which forbade prescription of the lands belonging to the State.

When Book 4, Title 12, Law 14 of the Recopilacion orders that the title of those who hold by a just prescription shall be confirmed, the term "just prescription" is a technical term in Spanish law. This law must be construed along with Law 17 of the same book and title, which shows that prescription is based on a defective title along with possession. The original provision was that prescription could not run against the Indians or the Royal Treasury.

The passage in the same law 14 reading:

> "Whereas we have fully inherited the dominion of the Indies and whereas the waste land and soil which were not granted by the Kings our predecessors or by ourselves in our name belong to our patrimony and royal crown"

is an express statement of the law in regard to the lands of Mexico. It says specially that all lands belong to the crown except those which have been granted by the King or his predecessors. It states that all land belongs to him and the only way in

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which ownership thereof can be acquired is by a grant from him. The same law further says:

> "After distributing among the Indians whatever they may justly hold, to cultivate and raise cattle, confirming to them what they now hold, and granting what they may want besides, all the remaining land may be reserved to us clear of any incumbrance for the purpose of being given as rewards or disposed of according to our pleasure."

That says that Indians might be given lands but a grant is always necessary to acquire something from the Crown. This law and several others contain provisions to protect and favor the Indians. The expression "confirming them in what they have" shows that it is necessary to have an act of confirmation. If there is no such confirmation or gift the Indians under the laws of Spain or Mexico had no title because it was impossible that there should be at the same time two owners of the same thing. This Act was not self-operative. It recognized a superior claim and conferred upon the proper representatives of the King the authority to make a grant to bodies of Indians who were thus given this preferential position. If no such appropriate proceeding were taken whereby a grant would issue, the Act itself commanded no title. In the passage from Chap. 11, p. 91, Vol. 1 of White's New Recopilacion reading

> "To constitute prescription, good faith, just title and capacity of the thing for the purpose

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> and of the person who prescribes are necessary; as also is continued or uninterrupted possession for a determinate time",

the expression "just title" means some title which is sufficient to transfer ownership like a sale, contract or agreement, and is possibly in a manner the same as color of title in American law. The "just title" is one which is not sufficient in itself. As to the requisite of "capacity of the thing for the purpose", the royal domain of Spain or the public lands of Mexico could not be acquired by prescription up to 1863. The passage above quoted is a statement of the underlying general law of prescription in Spain. It is applicable to individuals, but it was not possible to get the lands of the crown from the King by prescription because crown lands were not competent to pass by prescription. In 1863 a law was passed in Mexico allowing prescription against the government.

The passage quoted mentions as another essential for prescription "capacity of the person who prescribes". A community of Indians which had not been formally recognized as a pueblo by the government would not have the capacity to prescribe under that law because it had no legal entity. The article on prescription from Febrero Novisimo found at page 346, Vol. 1, White's New Recopilacion, requires,

> "1.—title of acquisition; that is to say that the thing to be held by purchase, gift, inheri-

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tance, or other of the contracts that transfer dominion; 2.—good faith; 3.—continued possession; 4.—the time prescribed by law; 5.—capacity of the person who prescribed, and of the thing prescribed."

"Title of acquisition" means "just title" which I have explained already. This is an explanation of the same law. The Royal Cedula of 1754 (2 White's Recop. 62-67) had several purposes. One was to make a general inquiry in regard to titles in Mexico, and it established the rule that all lands held in possession with titles prior to 1700, but without confirmation, would be held good if the titles were presented to be annotated. The main purpose was to make a general inquiry so that all lands not possessed with good title might revert to the crown. Titles up to 1700 were confirmed very easily. After 1700 titles were to be presented so that the lands if not surveyed might be surveyed and these titles might be compounded by paying certain fees to the Crown. The purpose was to secure a scrutiny of all outstanding titles and to recover the lands which were held without legal title, but at the same time several ways were provided to make such titles effective. The words "warrants or writings" in paragraph 4 might better be translated "titles or instruments". Where it says in the second division of the same paragraph "If persons have not warrants their proof of long possession shall be held as a title by prescription", this does not at all mean everyone

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who has been in possession of any land because the paragraph says that, it appearing by the titles of instruments that may be presented or by any other means, that they are in possession of such Crown lands by virtue of a sale or composition made by delegates, if they had such composition before the year 1700 they ought to have title which should be one of composition. The second part provides that when they present the paper title it is sufficient for any defect that may be cured. But if they have lost the paper title, then they can prove that they had such possession and such title and then the lands may be compounded. If anyone claiming a prescriptive title did not appear and prove it as required within the time fixed by paragraph 6, the law says that he lost his rights. In order to obtain a title based on prescription under this law, it was necessary to have a title coming from a sale or composition and possession of the land for a certain time and it was also necessary to appear before the official in order that such title might be noted, and if the paper title had been lost, to prove its existence and the fact of the possession. If this was not done, the result under paragraph 7 was that the possessor should be warned that upon failure to comply, the lands should become part of the royal patrimony in order to be sold to others, even though they were cultivated or with buildings on them.

In reply to the statement made in argument that this decree did not apply to Indians at all, I pro-

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duce the work entitled "Legislacion y Jurisprudencia sobre Terrenos Baldios", by Wistana Luis Orozco. This is a compilation of laws relating to Crown lands made "with the official authorization of the Mexican Government in 1895". On p. 131 appears a law of February 15, 1765, reading (witness here read the enactment which recounted previous published warnings to those failing to comply with the Cedula of 1754 and ordered a last peremptory publication, prescribing the method of making it). The law then continues:

> "All possessors who have not already presented their titles, as well as all *Indian pueblos*, which have only the enjoyment of the land granted to them, shall be ordered to appear in person or by attorney" (within specified periods). "* * *. They must be warned that if they fail now to comply with this last and peremptory command, they will be dispossessed of their lands, although they may have them with legitimate title, and that such land shall be sold on the account of His Majesty."

Article 27 of the Mexican Law of 1863, as translated in Hall's Mexican Law, p. 178, reads:

> "The provisions of the ancient laws which declare public lands imprescriptibl are repealed from this date."

The ancient laws referred to are those of Spain about which I have been testifying, and when it

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says that the ancient laws declared public lands imprescriptible, that means that they were so considered up to 1863.

The charter given to an Indian pueblo recognized by the Government might or might not assign a specific tract of land, but the law determines what kind of land may be given, viz.: a fundo legal—in the form of a square, or ejidos (commons) with the boundaries marked. The proceeding was to make a survey, calling in the neighbors in order to ascertain the boundaries of others and fix the pueblo boundaries with the consent of the neighbors. The Spaniards in the new world did not respect the Indian rights of possession very much because the law was enacted to protect the Indians against the Spaniards who were taking the land they had possessed or the land they had by law from the Crown.

Book 4, Title 7, Law 23, of the Recopilacion, translated in Vol. 2, p. 48 of White, relating to Spaniards making settlements among the natives reads in part: "Should the natives attempt to oppose the settlement, they shall be given to understand that the intention in forming it is to teach them to know God and his holy law * * * and not to do them any harm or take from them their settlements * * *. If, notwithstanding, they do withhold their consent, the settlers shall proceed to make their settlement without taking anything that may belong to the Indians and without doing them any greater damage than shall be necessary for the pro-

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tection of the settlers and to remove obstacles to the settlement." This law says clearly that the Spaniards should proceed to make the settlement as mildly as possible, to have the Indians at peace and contented, and to get their consent, and if not, that they make the settlement nevertheless, but try not to arouse the feelings of the Indians against them. The numerous laws in the Recopilacion for the protection of Indians requiring them to be left in possession of their lands; providing that lands should be granted to Spaniards in such manner as not to prejudice the Indians; that the Indians should be left in possession of the lands that belong to them, etc., absolutely do not recognize land titles in the Indians. They were mostly of a political nature and the statement is that they were always ready to give the Indians not title to their lands, but lands for the common enjoyment; but the law itself did not operate to give title. The native Indians had no title which was not subject to disposal of the Crown unless they had received some sort of grant, and I don't believe there is anything contrary to that idea in all these laws for Indian protection. It is absolutely clear to my mind that it was absolutely impossible to give title to any land without a grant of the Crown, and that is more clear after the Royal Order of 1754. The Proclamation or circular of President Juarez issued September 30, 1867, has great official weight. It is a rule of construction. After stating that when public lands are adjudicated

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and title issued care must be taken to avoid injury to third parties, it continues: "And, although such injury does not exist strictly speaking in respect to the lands which are in possession of the Indians when they lack their respective title given by competent authority, notwithstanding, the rule has been carried out by reason of equity and public interest", etc. This paragraph states the exact doctrine I have already stated, that the Indians have no title, and if not, they have no right to the possession of the lands themselves. It says that it requires a title given by competent authority, but, nevertheless, they being here, they want to respect them, and give them title which they have not. It also means that unless the Indians have title given by competent authority the lands they are on would be given to others without legal wrong. The passage near the end of the same circular requiring notice to the Indians "who may appear immediately to solicit the respective titles to lands which they are in possession of, even when no one disputes them, under the conception that such title shall be issued to them gratis, the title being thus legitimatized which otherwise might be claimed" means, among other things, that unless they had the title by grant, they had no title which the Government need respect. There is no difference between the principles set forth by this circular and the law of Mexico as to Indian rights up to 1853. The fact that Indians were made citizens and placed on an equality with other Mexicans at the time of

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the independence refers to political and civil classification and did not affect land titles in any way.

Book 6, Title 3, Law 15 of the Recopilacion, when it refers to pueblos means municipalities of Indians recognized by the government, and Laws 16 and 18 of the same title refer to the jurisdiction of the alcaldes in such Indian towns. There is no possibility to speak about an Indian pueblo if it is not recognized by the Government, and wherever you find the word in the Recopilacion with allusion to the Indians, it means that sort of pueblo.

In Book 4, Title 12, Law 19, where it says that communities of Indians shall be admitted to composition in preference to other persons, etc., it means that communities which possess lands without title can be so admitted. I have already said that the Indian towns have not the fee title, but only the enjoyment of the lands in common, but this special title can be compounded. This is a way by which Indian communities not officially recognized may obtain a title (witness corrects the foregoing statement) I misunderstood the question. My idea was, Indians who have a title which in (is) not perfect. If they had been recognized by the viceroys, but without royal confirmation, this was a way to perfect the municipality. It might also refer to Indians who have ownership in common, having acquired a tract of land without dividing it. They could apply for composition like any individual owner.

The Spanish or Mexican idea of the rights of Indians occupying land from time immemorial does

(Testimony of Manuel Garza-Aldape.)

not correspond with the United States law as to the occupancy or possession title of Indians. The only way in which a right can be acquired to land is by grant from the Crown or its successors. The occupancy or possession title of Indians was not recognized in Spain or Mexico.

Book 1, Title 2, Law 5 of the Siete Partidas does not support the idea that the right to be a corporation could be acquired in Spain or Mexico by immemorial prescription. It refers to the way in which a custom or unwritten law may be established and, after first defining "pueblo" in the sense of a group of people, says that if such a group or a majority of it have for a specified period done anything by way of custom and two decisions applying to said custom have been rendered in council without objection and the custom is consistent with right, reason, etc., such custom can be made obligatory as a law. Under Spanish or Mexican law, a community could not acquire municipal entity without some act of the government.

The statement made by counsel in argument that there were two kinds of Indian communities, those which existed before the Spaniards came, and the new reducciones, that the organized pueblo of Indians referred to the second class only, and that the old, immemorial villages were considered municipal entities without any governmental action, is not correct under the laws of Spain and Mexico. The further statement that the Papal Bull which gave title

(Testimony of Manuel Garza-Aldape.)

to the King made the grant conditional upon the King caring for the Indians and leaving them undisturbed in their possession was never recognized by said laws, which expressly say that all the lands belong to the King without making any exception at all.

Cross-Examination.

There were villages or groups of Indians not reduced to pueblos as a fact, but they have no legal standing under the Mexican law. There is no law which makes the definition or distinction that communities of Indians always mean officially recognized communities, but the general laws themselves show that clearly. In support of the proposition that all the land in America belonged to the King and could not be divested except by grant or composition, I also refer to the Royal Cedula of November 1, 1591, reading in part: "I order you that you make that all lands which every person may have or possess in this province without legitimate titles may be vested duly to him. Examine said titles for that purpose, because all is mine and all belong to me." This was reproduced in Law 14, Title 12, Book 4, which commences: "Whereas we have fully inherited the dominion of the Indies and whereas the waste land and soil which were not granted by the Kings our predecessors or by ourselves in our name belong to our patrimony and royal crown." Where the same law reserves everything necessary for the inhabited villages and towns, granting to the In-

(Testimony of Manuel Garza-Aldape.)

dians that which they need, confirming them in that which they now have, and giving them, in addition, that which is necessary, this refers to any rights they may have apart from mere possession. Possession as a fact, not as a right, cannot come under the provisions of this law. If Indians had possession with certain rights or titles, they should be protected. If they did not have them, they had absolutely to obtain lands from the crown which was ready to give those lands to them. If the Indians had grants, although imperfect and not confirmed, they might have rights which should be confirmed. The law says give the Indians lands for their labors or for what they need, but that is not an actual gift. It is a promise. Until this is done there is no basis for any right. It also says that as to what they have, we must proceed to an act of confirmation and if this is fulfilled, they may have it. These limitations and as well the requirement to give them in addition what may be necessary all require an act and confirmation. All these things mean grants. A confirmation is nothing but a grant, because the King may allow them any claim they have against a particular piece of land. Such confirmation would be in the form of a paper or grant.

Composition presupposes previous title, and mere possession is not a matter of composition. A man may have possession of a thing, but no matter how long he has it he has no right to it, but he may have a thing with a right to acquire it, and then it is

(Testimony of Manuel Garza-Aldape.)

called possession. Indians could acquire property individually or as pueblos, and individuals who acquired and held land in common could compound that like any other individuals, and the expression communities of Indians means either a recognized pueblo or unrecognized group possessing lands in common. I have examined several titles in Indian communities of that kind. Such a group of so-called owners has no entity.

It is impossible to think of any village or community or Indian pueblo without license from the King for the organization. (Witness reads from the Ordenanzas on Lands and Waters, p. 102, an authority referring especially to Mexico, and published in 1856.) It is impossible to think of the founding of a town without royal license.

The Juarez circular of 1867 states what the disposition of the Mexican Government was in regard to Indians at that time. It was the owner of the lands which had not been granted or acquired by private persons, so the owner says to the Indians: "Although you have not title, I am ready to give you one." That was a letter of instruction by an Executive Department and was sound if the President or his Minister understood the law aright.

The Spanish Kings tried to protect the Indians in every way, but the Spaniards who came to America did not care much for the protection of the Indians, and that was precisely why these laws were enacted.

As to the proposition that the ejidos were devoted

(Testimony of Manuel Garza-Aldape.)

to the common use of the inhabitants and could not be converted into a fee title. I quote the official Codigo de Colonizacion y Terrenos, by Francisco L. Maza, p. 21. This collection shows Royal Cedula No. 23 of May 20, 1611, making a grant to an Indian pueblo and containing these words: "I call these lands crown lands because they are given for the common use of all the inhabitants of the pueblo and because the ownership in said properties were subject to the King, and the use of them was granted to the subjects; and because said lands are to be held in common they cannot be sold or pledged."

"Just title" means prescription under color of title, and the occupancy of a particular piece of land for 40 years without paper title could not result in title under the old Spanish law.

I think the Juarez Circular of 1867 is analogous to a circular of instructions issued by the General Land Office of this country expressing the construction that office places on the law. It says that the Indians who have mere tenancy, no matter for how long a time, have not title and they need to have one, and the Government is ready to give them one. That circular did not in any way alter the general view of Mexican law up to 1863. (Original Transcript of Testimony, pp. 370-449.)

In the United States District Court
for the District of Arizona

October 1938 Term — At Phoenix

MINUTE ENTRY OF
WEDNESDAY, MARCH 1, 1939
(Prescott Division)

Honorable Dave W. Ling,
United States District Judge, Presiding.

E-190

THE UNITED STATES OF AMERICA, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona,

Plaintiff,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

Defendant's Motion to Dismiss having been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

It Is Ordered that said Motion to Dismiss be and it is granted, and that this case be and it is dismissed. [252]

[Title of District Court and Cause.]

SUPPLEMENTAL ORDER AND OPINION

The Court, having heretofore and on the first day of March, 1939 entered its judgment herein granting the motion of the defendant to dismiss the case and ordering the case dismissed, deems it best to file herein the conclusions upon which such order and judgment are based.

It Is Therefore Ordered that this opinion shall be filed in the records in this cause and become a part of them and supplementary to the said judgment heretofore entered, the Court's conclusions being hereinafter set out.

The motion to dismiss in this case was extensively briefed and argued; in defendant's original brief, plaintiff's brief and defendant's reply brief, the Court has had the benefit of the exhaustive researches of counsel into the public records of the nation bearing upon the public history affecting treaties and laws and the course of their administration, of which the Court has judicial knowledge. In the interest of brevity, the Court will state its conclusions and refer to the sources of information indicated in the points and authorities attached to defendant's Motion to Dismiss, from which the Court has drawn its [253] conclusions, specifically referring in these findings only to such sources of information to which the Court has had recourse which are not indicated in such points and authorities but which were referred to by the parties in briefs and oral argument.

The Court finds:

1. The crucial issue is whether the Walapai Indians had some nature of right to the lands here in issue which prevented the grant made by the Act of July 27, 1866, 14 Stat. 292, from becoming operative as to them. This grant was in praesenti, taking effect by relation from the filing of the Map of Definite Location, March 12, 1872.

2. The Walapai were of the savage tribes referred to in the Treaty of Guadalupe Hidalgo, 9 Stat. 922. It is not claimed they were granted lands by Spain or Mexico. Sources and authorities referred to by defendant in support of its points IB and ID, and the sources and authorities referred to in appendix to defendant's original brief, here referred to and made a part hereof, are conclusive that these Indians had no rights to the land in controversy under the laws of Spain and Mexico; and from the brief and argument of plaintiff it is clear that it does not and cannot controvert this point. In considering the Treaty of Guadalupe Hidalgo, the Court was referred to and has considered the protocol thereto, and Senate Executive Document 52, Thirtieth Congress, First Session, "Proceedings on the Treaty of Guadalupe Hidalgo."

3. For plaintiff to prevail, it must show some act of the legislative or executive departments of the government creating some right in the Walapai Indians superior to the rights of defendant under the Granting Act. Such an act would necessarily be a public one. Not only has plaintiff been unable to

produce record of such, or suggest the existence of such, but the researches of the Court fail to show the existence thereof. [254] Further, the sources and authorities cited by defendant in its points and authorities, Points ID, IE and IF, show beyond possibility of challenge:

(1) that it was not the policy of the United States to accord these Indians any possessory or other right because of any alleged occupancy claim;

(2) that their only right was to such reservations as were lawfully established for them, viz., the lower Colorado River reservation established by statute in 1865, and the even but not the odd numbered sections of the Walapai reservation established by executive order in 1883;

(3) that the lands of Arizona were from their acquisition public domain open to sale and grant; and

(4) that the Congress intended to grant and did grant to the Atlantic and Pacific Railroad Company, to whose rights defendant is successor, the lands here in controversy, except such as were reserved or disposed of to settlers, or subject to lawful claims or rights, prior to March 12, 1872, as a means of opening the country to white development and solving the corollary problem of subduing and controlling the Indians. Plaintiff's theory of public policy directly contradicts the public policy announced by every act of Congress relating to the problem and the actual course of administration by the executive branch pursuant to lawful authority.

The Court's conclusion in this respect has been in part drawn from consideration of the instructions from the Commissioner of the General Land Office, approved by the Secretary of the Interior, to the Surveyor General of New Mexico on August 21, 1854, appearing at page 398 of Donaldson's work on The Public Domain, and consideration of Pueblo Indian Land Hearings, Subcommittee on Public Lands, Sixty-Seventh Congress, Fourth Session, on S-3865 and S-4223, California Indians Jurisdictional Act Hearings, Committee on Indian Affairs, [255] United States Senate, Seventy-Fourth Congress, First Session, on S-1793 (Government Printing Office 1935), Hearings before the Committee on Indian Affairs, United States Senate, Seventy-Fifth Congress, First Session, on S-1651 and S-1779 (Government Printing Office 1937), and an extensive examination of House Executive Document 1, Part 5, Forty-Second Congress, Third Session, Report of the Secretary of the Interior (1872) and documents transmitted with it by the President to Congress; I have also considered the Eighteenth Annual Report of the Bureau of American Ethnology.

4. Had there been any rights in these Indians such as plaintiff asserts for them, there is no doubt that they were extinguished by acts of Congress and lawful acts of the executive pursuant to sovereign political prerogative, in such time and manner that the existence of such rights would not have interfered with the attachment of the railroad title. I have arrived at this conclusion from the sources and

authorities referred to in support of its point II by defendant.

5. I find that the sources and authorities cited by defendant in support of its Point III establish beyond possibility of question:

(1) That both Congress and the Executive have conclusively confirmed defendant's title to the lands in issue so that it must prevail against any attack by the United States;

(2) That the lands in issue were never reserved to the Walapai, but granted to defendant's predecessor in title and confirmed to defendant;

(3) That the railroad's title to the odd numbered sections of the Walapai Reservation was not affected by the executive order of Jan. 4, 1883, and has since been conclusively confirmed by the Congress and Department of the Interior;

(4) That there is no basis for any claim of adverse possession as respects the first cause of action.

6. The controlling elements of this case, namely, the laws of Spain and Mexico, the Legislation of Congress, and the course of administration, are matters of judicial knowledge. It is perfectly clear that no evidence adducible would in any way affect the result of the case. The plaintiff has conceded that the only evidence it can offer cumulating what the Court judicially knows would go to the question of tribal organization of the Walapai, the issue whether the Walapai possessed any country at all (as distinguished from being mere wanderers in a land of other wanderers), and lastly the question of the extent of country possessed, or over which they

wandered, as the case may be. No evidence upon the issues plaintiff desires to prove would enable plaintiff to escape the controlling effect of public law and public administration, which the Court judicially knows, which cannot be controverted by evidence and which requires dismissal of the case.

Done this 6th day of March, 1939.

DAVE W. LING
Judge

[Endorsed]: Filed Mar. 6, 1939. [257]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73

Notice is hereby given that The United States of America as Guardian of the Indians of the Tribe of Hualapai in the State of Arizona, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the order and judgment sustaining defendant's motion to dismiss and dismissing the complaint of the plaintiff entered in this action on March 1, 1939, and from the supplemental order and opinion entered in this action on March 6, 1939.

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United States Attorney for
the District of Arizona
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Pueblo Indians,
802 First National Bank Bldg.,
Albuquerque, New Mexico.

[Endorsed]: Filed May 27, 1939. [258]

[Title of District Court.]

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss:

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of The United States of America as Guardian of the In-

dians of the Tribe of Hualpai in the State of Arizona, Plaintiff, versus Santa Fe Pacific Railroad Company, a corporation, Defendant, numbered E-190 Prescott, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 264, inclusive, designated as Volume One of Transcript of Record; and Brief of Defendant in Support of its Motion to Dismiss the Complaint, designated as Volume Two of Transcript of Record, and Reply Brief of Defendant Answering Plaintiff's Brief filed with Respect to Defendant's Motion to Dismiss, designated as Volume Three of Transcript of Record, which said Volumes Two and Three are transmitted herewith, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Appellant's Designation of Contents of Record on Appeal and Appellee's Desigation of Additional Contents of Record on Appeal, filed in said cause and made a part of the transcript therein, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $98.35, and that a memorandum of said sum has been entered in said cause by me for services rendered on behalf of the United States.

Witness my hand and the seal of the said Court this 22nd [265] day of August, 1939.

[Seal] EDWARD W. SCRUGGS,
Clerk

By WM. H. LOVELESS
Chief Deputy Clerk. [266]

[Endorsed]: No. 9271. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, as Guardian of the Indians of of the Tribe of Hualapai in the State of Arizona, Appellant, vs. Santa Fe Pacific Railroad Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed August 24, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9271

UNITED STATES OF AMERICA as Guardian of the Indians of the Tribe of Hualapai, in the State of Arizona,

Appellant,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation,

Appellee.

Appeal From the United States District Court
for the District of Arizona

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT TOGETHER WITH DESIGNATION OF PARTS OF RECORD.

Pursuant to Rule 19(6) of the Rules of the United States Circuit Court of Appeals for the 9th Circuit, Appellant makes the following statement of the points upon which it intends to rely in the Appeal together with designation of the parts of the Record necessary for the consideration thereof:

I.

At all times material the Walapai Tribe of Indians have been in the possession and occupancy of the lands described in the Complaint.

II.

On the effective date of the railroad grant of July 27, 1866, c. 278, 14 Stat. 292, the Walapai Tribe of Indians had a right to possess and occupy the lands described in the complaint and that right never has been extinguished.

III.

The railroad grant of July 27, 1866, c. 278, 14 Stat. 292, did not operate as to the land described in the Complaint because that land was not public land and because that land was "reserved" and "otherwise appropriated" and subject to "other claims or rights" within the meaning of the grant; therefore, the United States is the owner in fee of that land subject to the unextinguished right of possession and occupancy in the Walapai Tribe of Indians.

IV.

Any rights or title to the odd-numbered sections within the Walapai Indian Reservation that the railroad may have acquired under the railroad grant of July 27, 1866, c. 278, 14 Stat. 292, have been forfeited by reason of the failure of the railroad's predecessor in title to comply with the terms of the grant and to complete the construction of the road to and through the Walapai Indian Reservation within the time required under the terms of the grant and prior to the formation and creation of the Walapai Indian Reservation.

V.

The United States is the owner in fee by adverse possession of the odd-numbered sections of land within the Walapai Indian Reservation.

VI.

Any right or title to the lands described in the Complaint that the railroad may have acquired under the grant of July 27, 1866, c. 278, 14 Stat. 292, are subject to the unextinguished right of occupancy and possession of the Walapai Tribe of Indians in those lands.

The parts of the Record necessary for the consideration of the points relied upon, are as follows:

1. The Complaint.
2. Motion to Dismiss Plaintiff's Complaint.
3. Order and Judgment of the District Court sustaining Motion to Dismiss.
4. Supplemental Order and Opinion of the Court entered March 6, 1939, together with the material therein incorporated by reference.

THE UNITED STATES OF AMERICA,
As Guardian of the Indians of the Tribe of Hualapai, in the State of Arizona, Appellant.

By R. H. HANNA
Special Assistant to the
Attorney General
806 First National Bank Bldg.,
Albuquerque, New Mexico.

[Endorsed]: Filed Aug. 24, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Pursuant to Rule 19 (6) of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Appellee designates the following parts of the record to be included in the printed record:

1. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss plaintiff's Complaint, which Memorandum was filed in the District Court on the 31st day of March, 1938, as a part of the Motion to Dismiss Plaintiff's Complaint.

2. Appendix to Brief of Defendant Santa Fe Pacific Railroad Company in support of its Motion to Dismiss the Complaint, which brief was filed in the District Court on the 3d day of May, 1938.

CHAS. H. WOODS
JOYCE CCX
H. M. FENNEMORE
HENRY W. ALLEN
J. EARLY CRAIG
V. T. BLEDSOE
RICHARD FENNEMORE
Counsel for Appellee.

[Endorsed]: Filed Sep. 1, 1939. Paul P. O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt From Proceedings of Friday, March 29, 1940

Before WILBUR, MATHEWS, and HEALY, Circuit Judges

Order of submission

Ordered appeal in above cause argued by Mr. Norman MacDonald, Attorney, Department of Justice, counsel for appellant, and by Mr. Joyce Cox, counsel for the appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, August 30, 1940

Before WILBUR, DENMAN, and HEALY, Circuit Judges

Order directing filing of opinion and filing and recording of decree

By direction of the Court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9271—Aug. 30, 1940

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALAPAI IN THE STATE OF ARIZONA, APPELLANT

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE

Upon Appeal from the District Court of the United States for the District of Arizona

Before WILBUR, MATHEWS, and HEALY, Circuit Judges

WILBUR, Circuit Judge: This suit was brought by the United States in its own behalf and as guardian of the Walapai [1] Tribe of

[1] (Variously spelled Hualpai, Hualapai, or Walapai, etc.)

Indians of Arizona to enjoin the defendant, Santa Fe Pacific Railroad Company (hereinafter called the Santa Fe Railroad Company, or, the Railroad Company) from interfering with the alleged possessory rights of that tribe to certain lands in northwestern Arizona.

The lands to which these possessory rights are claimed were included within the grant made to defendant's predecessor, the Atlantic and Pacific Railroad Company, by Act of Congress of July 27, 1866, (14 Stat. L. 272). This act granted the odd-numbered sections of land within specified distances on each side of the line of railroad to be constructed, the specific sections to be identified later. This identification was fixed March 12, 1872, when the map of the proposed railroad was filed and accepted.

In 1864 a reservation for the Walapai Tribe was created by Congress (13 Stat. 569) on lands on the lower Colorado River not within the limits of the railroad grant.

In 1883 another reservation for this tribe was created by proclamation of President Arthur. This reservation was in northwest Arizona and included lands covered by said railroad grant.

The complaint contains two counts: the first, for interference with the possession of lands within the boundaries of the reservation created in 1883; the second, for interference with the possession of lands within the odd numbered sections outside this reservation and within the limits of the grant.

Defendant moved to dismiss the complaint on the ground that it failed to state a cause of action, in that matters of which the court took judicial notice showed that the Walapai Tribe had no possessory rights as alleged. The court granted the motion and the plaintiff appeals.

The act of 1866 limited its grant of alternate sections with these words: "whenever the United States have full title, not reserved, sold granted, or otherwise appropriated, and free from prescription or other claims or rights." Literally this requires that no section is within the grant unless it is free from "all other claims or rights" and certainly a right of possession would fall within that description. A logical consequence of that interpretation would be that if the Walapai Tribe had their alleged possessory rights the lands to which they applied were not covered by the grant and the Railroad Company would be entitled to lieu lands. (Act of 1866, sec. 3.) However, in construing a similar grant of lands in Dakota, made by Congress July 2, 1864, to the Northern Pacific Railroad, in Buttz v. Northern Pacific Railroad, 119 U. S. 55, the Supreme Court held that an identical limitation did not exclude from the grant lands to which the Indians had a right of occupancy only. This conclusion was partly based upon the provision in the granting act wherein the

United States agreed to extinguish the Indian title to all lands falling under the operation of the act. The same provision is in the granting act to the Atlantic and Pacific. (Sec. 2, Act of July 27, 1866, 14 Stat. 292.) The Supreme Court said:

"In our judgment the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy."

The word "occupancy" is used interchangeably with "possession" in appellant's brief.

Appellant concedes that the grant of 1866 to defendant's predecessor in interest, the Atlantic and Pacific Railroad Company, passed the fee to the lands in question; but it contends nevertheless that the grant was subject to the Tribe's possessory rights in whatever lands they actually occupied.

The first question then is as to the origin of the right of Indian occupancy which is herein asserted to be superior to the railroad grant. The right, if any, at the time the grant became effective in March 1872, is the one involved for after the grant vested it could not be subsequently divested by any act of the government or of the Indians.

Appellant argues that there is uniform governmental policy of recognizing rights of occupation as vested in all Indian tribes with respect to land actually occupied by them at the time they were brought under the sovereignty of the United States and that such rights were good against all but the government of the United States. It must be conceded that this view is consistent with what has been the common practice in dealing with the Indians occupying lands other than lands within the area ceded by Mexico to the United States. Cf. Bates v. Clark, 94 U. S. 294; Spaulding v. Chandler, 160 U. S. 402, 403. Their practice, has been based upon the policy of maintaining just and peaceable relations with the Indians and is discussed and considered in a number of early cases, such as Johnson v. Graham, 8 Wheat. 543, decided in 1823.

But, since the whole of the Indians' title depends entirely upon the policy of the federal government, it is obvious that what may have seemed the best policy in dealing with Indians in territories acquired prior to the treaty of Guadalupe Hidalgo might not have seemed the best policy in dealing with Indians occupying the area ceded by Mexico in that treaty.

Appellee argues that since, apart from exceptional instances as in case of the lands of the Pueblo Indians, the Mexican government recognized no rights in the Indians with respect to lands in this area at the time of the cession, they cannot be deemed to have acquired any such rights of possession in the absence of affirmative action by the United States. To this appellant replies that there

is no sound reason for assuming a discrimination against the Indians of the Mexican cession. In support of appellant's contention a case decided by this court, United States v. Walker Irrigation District, 104 F. 2d 334, is cited; but that case merely recognized that the government was under a moral obligation to the Indians of the ceded area of such a nature that the creation of an Indian reservation therein must have carried with it the right to the use of water from a stream within the reservation, water without which the land reserved would be worthless. It is obvious, however, that this case throws little light upon the possessory rights of Indians within the Mexican cession.

Since it is conceded that the title of the United States was absolute, except in certain cases of specific grants, and since there is no all-embracing rule governing the possessory rights of the Indians upon the public domain, their rights within the territory ceded by Mexico must be neither more nor less than what the government, whether justly or unjustly, chose to recognize. And that must be determined from the course of governmental action, as contended by appellee. That question we will now consider.

One of the most significant pieces of legislation by Congress in this connection is the Act of July 22, 1854 (10 Stat. 308), establishing the offices of Surveyor-General of New Mexico, Kansas, and Nebraska. This act (sec. 2) provided for a donation of 160 acres of land to certain settlers. It excepted from the land subject to donation lands claimed under the laws, usages, and customs of Spain and Mexico.[2]

While as to Nebraska and Kansas the Act provided that the only land subject to preemption under the preemption act of 4 September 1841 was land to which the "Indian title" had been or should be extinguished (Sec. 12 of Act of 1854, supra), the Act further provides in Sec. 13, "that the public lands in the territory of Nebraska to which Indian title shall have been extinguished

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[2] The act provided that the Surveyor-General of New Mexico, under instructions given by the Secretary of the Interior, should "ascertain the origin, nature, character, extent of all claims to lands under the laws, usages and customs of Spain and Mexico. * * * He shall make a full report on all such claims as originated before the cession of the Territory to the United States by the Treaty of Guadalupe Hidalgo of 1848, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. * * * Until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

On August 21, 1854, the Commissioner of the Land Office, acting with the approval of the Secretary of the Interior, instructed the Surveyor-General of New Mexico, which then included the land now in question, to recognize no title or right in the land that was not recognized by Mexico before the cession as follows:

"It is obligatory on the Government of the United States to deal with the private land titles, and the 'pueblos,' precisely as Mexico would have done had the sovereignty not changed. We are bound to recognize all titles as she would have done—to go that far, and no further. This is the principle which you will bear in mind in acting upon these important concerns."—DonaMson, The Public Domain, 308.

shall constitute a new land district to be called the Omaha District and the public lands in the territory of Kansas to which the Indian title shall have been extinguished shall constitute a new land district."

It seems clear from the foregoing provisions of the Act that Congress recognized in the territory of New Mexico only those Indian rights which existed under Spanish or Mexican law at the time of the cession of the land to the United States by Mexico.

In 1870 Congress provided for the appointment of a Surveyor-General for Arizona and charged him with the duty of investigating Spanish and Mexican land titles therein, in the same manner as the Surveyor-General of New Mexico had done under the Act of 1854. (Appropriation Act, July 15, 1870, 16 Stat. 291, 304.) This Act is significant here only as indicating a continuing policy of recognizing only rights in land theretofore existing in the ceded territory.

On March 3, 1871, Congress enacted a statute prohibiting future treaties with Indian Tribes (16 Stat. 544, 566; 25 U.S.C.A. § 71), thus asserting the right of the government thereafter to define the rights of Indians with or without their consent.

In 1865 Congress validated an agreement made between Arizona's first Indian superintendent and the Walapai and certain other tribes for the establishment of a reservation of 75,000 acres "from Half Way Bend to Corner Rock on the Colorado River." (Act of March 3, 1865, 13 Stat. 541.) If at that time Congress regarded this whole vast area of Arizona as a body of land to which the Indians in actual occupation had possessory rights which it purposed to continue to recognize it is difficult to understand why it should have created this reservation. This act of March 3, 1865, is far more consistent with an intent to limit the poessessory rights of Indians on the Colorado River and its tributaries to the reservation thus created.

Entirely consistent with this view and difficult to understand on any other ground is the Act of July 27, 1866, granting land to the Atlantic and Pacific Railroad Company to finance the construction of the proposed railroad. It must be remembered that this act granted lands to the Railroad Company "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast * * *" But the fee in a section of land in which a tribe of Indians had a legal right of exclusive occupation would obviously be worth nothing to the railroad or its purchaser. With such an encumbrance no land could be sold and the purpose of the grant would be utterly defeated. In U. S. v. Shoshone Tribe, 304 U. S. 111, a case involving a treaty right of an Indian tribe to possession of land, the court said: "For all

practical purposes the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the fee, would transfer no beneficial interest."

This seemingly insurmountable difficulty is met by appellant with the argument that, as in the case of the Northern Pacific grant, already discussed, this act specifically provided (in Sec. 2) that "the United States should extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act."

A consideration of the act granting to the Railroad Company as a whole indicates an intent on the part of Congress to avoid defining the Indian rights affected by the railroad. Certainly Congress did not intend in the act, for the benefit of the Railroad Company, to create new and theretofore unrecognized rights in Indians, adverse to the right of the grantee. Throughout the territory traversed by this railroad, and others to which similar grants had been made, there were Indian treaty rights of various sorts, and possessory rights and reservation rights. The debates in Congress, published in the Congressional Globe for March 1 and 2, 1866, relating to the interpretation of this act, indicate a purpose to deal only with existing Indian rights, whatever they might be and wherever situated.

The government relies so strongly upon the holding of the Supreme Court in Buttz v. Northern Pacific Railroad Co., supra, as recognizing and declaring a possessory right in favor of all Indians in possession of government land otherwise undisposed of as to call for a further analysis of that decision. The action was brought by the Railroad Company to recover possession of a small tract of land in the Territory of Dakota, claimed by it under a grant made in 1864 by Act of Congress. The defendant claimed under the preemption law of 1841. The land, said the court, was within "what is known as the Indian country. At the time the Act of July 2, 1864 was passed, the title of the Indian tribes was not extinguished. But that did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance."

The court went on to say: "In the grant to the Railroad Company now before us, Congress was not unmindful of the title of the Indians to the lands granted and it stipulated for its extinguishment by the United States as rapidly as might be consistent

with public policy." The opinion then recounts various steps taken by the government in fulfilling this policy, steps resulting in the final retirement of the Indians to established reservations and a payment to them for the relinquishment of their claim to possessory rights over the area, including the land in dispute.

Thus it appears that the only thing actually decided by this Northern Pacific case was that by virtue of the grant of 1864 to it and the subsequent extinguishment of the Indians' possessory rights, the Railroad Company acquired not only the fee but a right of possession as against one claiming a right accruing after the grant under the Preemption Act. It decided nothing as to the origin or extent of the Indian rights prior to the Act of 1864. However, though not necessary to the decision, because the right, if any, had been extinguished, the court clearly recognized that the Indians had an undefined right to possession over area on either side of the railroad which it designated as "Indian country" which did not pass to the Railroad Company with the grant of the fee in the Act of 1864 and was not lost until finally surrendered at a later date.

That case did not deal with lands in the territory ceded by Mexico which has a different history of governmental action, Spanish, Mexican and United States. Some of these facts we have already considered, but much of the history cited relates to governmental action after the grant of July 27, 1866.

The Acts above enumerated, it will be observed, were all enacted prior to 1872 when the Railroad Company's rights in the land grant vested. These statutes recognized no rights of the Indians in Arizona other than those existing under Mexican law or created by reservations after the Mexican cession to the United States. These rights did not include possessory rights of Indians. No other Acts of Congress recognized such possessory rights. The rights claimed by the plaintiff on behalf of the Indians were dependent upon a recognition thereof by the United States government. They were not recognized. Even if such rights were recognized and thus given substance they would be extinguished by later nonrecognition. There is thus a clear distinction between the possessory rights of Indians in the territory ceded by Mexico and other areas within the United States derived from other sovereigns wherein Indian rights of possession had always been recognized by that sovereign and continued to be recognized by the United States.

Reference has already been made to the creation of a reservation for the Walapai in 1854–1855. In 1867 the agent at La Paz, Arizona, reported that lack of funds had prevented bringing the Walapai to their reservation. But in 1872, acting under the

authority of President Grant, General Howard ordered all Indians in that section of the country to go to their respective reservations. In 1874 the Walapai were forcibly taken to their reservation. There could not be a more effective denial of the possessory rights of the Walapai to lands outside their reservation than this act of forcible expulsion from such lands by executive action in accordance with the Act of Congress creating the reservation (13 Stat. 541, supra; cf. Buttz v. Northern Pacific R. R. Co., supra).

What has just been said also applies to the second cause of action which concerns lands outside of any Indian reservation; but it is equally applicable to the first cause of action which concerns lands within the reservation which was created for the Walapai in 1883 by Presidential proclamation, subsequently ratified by Congress (Act of February 20, 1925, 43 Stat. 954).

In 1925 Congress passed an act for the consolidation of the Indian lands within the Walapai reservation created in 1883. This consolidation was to be effected by an exchange of some of the Indian lands for private lands "* * * so that the lands retained for Indian purpose may be consolidated and held in a solid area so far as may be possible * * *" (Act of February 20, 1925, ch. 273; 43 Stat. 954). In pursuance of this authority the Commissioner for Indian Affairs negotiated a contract with the Railroad Company under which the Indians were to have a consolidated area of 462,213.18 acres, and the Railroad Company 126,476.88 acres less, that is, 335,736.30 acres. The division was based on value rather than acreage. The estimated value of the lands retained, or transferred to the use of the Indians, was $245,221, and of the Railroad lands retained or procured by exchange was $212,517. At the time of this negotiation there was pending in the United States District Court for Arizona an action brought by the United States on behalf of the Walapai Indians, against the Santa Fe Railroad Company, appellee's predecessor, to determine the right to the waters flowing from Peach Springs which arose on an even-numbered section of land within the reservation and which it was claimed had been appropriated and used for over forty years by the Railroad Company, or its predecessors, on its odd-numbered sections. The proposed agreement for the exchange of lands settled the relative rights of the Indians and of the Railroad Company to the use of the waters of Peach Springs. In pursuance of this agreement a stipulation for a decree in the pending suit was entered into and a decree followed confirming the agreement as to the waters of Peach Springs.

Before the whole agreement was approved by the Secretary of the Interior a committee of the United States Senate held exten-

sive hearings on the question of the rights of the Walapai Indians. The committee had before it the opinion of the Solicitor of the Interior Department, E. C. Finney, addressed to the Secretary of the Interior on September 16, 1931, and an opinion of Seth W. Richardson, Assistant Attorney General, acting for the Attorney General of the United States, dated November 12, 1931, both denying the alleged possessory rights of the Walapai Indians to the odd-numbered sections of land within the Walapai Reservation of 1883. Notwithstanding these opinions the Chairman of the Committee requested the Secretary of the Interior to withhold approval of the agreement until the matter was further considered by the Committee (Walapai Papers, Document 273, 74th Congress, 2d Session, supra). If the rights of the Indians to the land in question were vested, beyond the power of governmental interference, the failure of the negotiated agreement for lack of approval by the Secretary of the Interior perhaps would deprive the Act of 1925, supra, and the negotiations under it, of all significance, except for the consummation of the agreement, concerning the waters of Peach Springs. But the Indian right of occupancy is entirely dependent upon the will of the sovereign. Consequently, the negotiation of the agreement authorized by Congress was a recognition by the sovereign of the right of the Railroad Company to the possession of the odd-numbered sections, although the land was within an area set apart for the use and occupation of the Indians. The teaching of the cases is that the bare fee in the land, which is subject to the Indian right of occupancy, is practically valueless. Hence, no agreement of exchange was necessary unless the right of the Railroad Company to the odd-numbered sections included the right of possession thereto. It is unnecessary to hold that the Act of 1925, supra, and proceedings under it effectively negatived the Indian right of possession, if any, but it is at least cumulative evidence of a purpose of the government to deny a right of occupancy to Indians within the Mexican cession not recognized by Spain and Mexico.

It should be added that the negotiated agreement with reference to the lands within the reservation considered as an act of the sovereign, denying Indian possessory rights, is applicable as well to lands outside the reservation, described in the second count of the complaint.

We conclude that evidence, of which the courts take judicial notice which cannot be affected or overcome by testimony of possession, shows that the Walapai Tribe of Indians in Arizona have no recognized right of occupancy of public lands other than in reservations set apart by the government for the tribe; that this right in the reservation set apart by Presidential proclamation in

1883 is subject to the prior vested right of the appellee to the odd-numbered sections of the grant within the reservation; that the decree should be affirmed as to land in controversy both within and without the reservation.

Affirmed.

[Endorsed:] Opinion. Filed Aug 30, 1940. Paul P. O'Brien, Clerk.

Decree

United States Circuit Court of Appeals for the Ninth Circuit

No. 9271

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALAPAI IN THE STATE OF ARIZONA, APPELLANT

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE

Appeal from the District Court of the United States for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Arizona and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed:] Decree. Filed and entered August 30, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 9271

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALAPAI IN THE STATE OF ARIZONA, APPELLANT

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE

Order staying issuance of mandate

Upon application of Mr. Charles Fahy, Acting Solicitor General of the United States, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including November 29, 1940; and in the event the

petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated San Francisco, California, October 28, 1940

[Endorsed:] Order, etc., filed Oct. 28, 1940. Paul P. O'Brien, Clerk.

No. 9271

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALAPAI IN THE STATE OF ARIZONA, APPELLANT

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE

Certificate of clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under rule 38 of the revised rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 218 pages, numbered from and including 1 to and including 218, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Charles Fahy, Acting Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of October A. D. 1940.

[SEAL] PAUL P. O'BRIEN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE 1940

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY

Motion for an extension of time within which to file petition for writ of certiorari

To the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States:

Your petitioner, the United States, respectfully presents this, its application for an extension of time within which to file a petition for a writ of certiorari in the above entitled case and, in support thereof, presents the following:

1. The United States brought this suit to enjoin the Santa Fe Pacific Railroad Company from interfering with the alleged possessory rights of the Walapai Tribe of Indians to certain lands in northwestern Arizona.

2. The issue involved is whether, where a railroad was granted certain public lands, formerly a part of the lands acquired from Mexico by the Treaty of Guadalupe Hidalgo, which were in the possession of a tribe of Indians on the effective date of the grant, the tribe of Indians had a right of occupancy of such lands under the public policy of the United States so that the title acquired by the railroad under the grant was subject to that right, and if so, whether the right of occupancy has been extinguished by the United States.

3. On August 30, 1940, the United States Circuit Court of Appeals for the Ninth Circuit rendered its decision and entered its order, affirming the judgment of the United States District Court for the District of Arizona dismissing the bill of complaint.

4. Upon considering the filing of an application for a writ of certiorari, it was found that in a sense the Department of Justice is on both sides of the question. That arises in this way. Counsel for the Walapai Tribe may find it advisable to urge in this case that the aboriginal possession of the tribe gave them a right of occupancy valid even as against the United States, even in the absence of treaty recognition, and which could lawfully be extinguished only with the consent of the tribe. However, the Department of Justice, in opposing Indian claim suits, has taken the opposite position in the Court of Claims that there is no Indian right of aboriginal possession which will ground a claim against the United States.

5. It has been determined that a petition for a writ of certiorari should be filed. However, in view of the existing conflict and with the best interests of the Walapai Tribe in mind, the Department of the Interior has undertaken to prepare and present the case to the Supreme Court.

6. It appears in view of the late date on which the case was assigned to it, that the Department of the Interior will require additional time to consider the case and prepare the petition for a writ of certiorari.

Wherefore, it is respectfully requested that the time allowed for the filing of a petition for a writ of certiorari be extended for a period of sixty days from November 30, 1940, the date upon which the time allowed by statute expires.

FRANCIS BIDDLE,
Solicitor General.

Order extending time within which to apply for writ of certiorari

On consideration of the motion of counsel for petitioner in the above entitled case, and good cause therefor having been shown, it is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same is hereby, extended for a period of sixty days from November 30, 1940.

Dated this 22 day of November, 1940.

WILLIAM O. DOUGLAS,
Associate Justice of the
Supreme Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed March 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1941

No. —

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

NATHAN R. MARGOLD,
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RICHARD H. HANNA,
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WILLIAM A. BROPHY,
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Albuquerque, New Mexico;

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Assistant Solicitor, Department of the Interior,
Washington, D. C.,
Attorneys for petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor of the Department of the Interior of the United States, being authorized by the Solicitor General of the United States,* on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on August 30, 1940, affirming a judgment of the United States District Court for the District of Arizona.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 114 F. (2d) 420. The opinion of the

* The authorization reflected a possible conflict of interest between the United States and its Indian wards on one branch of the argument (R. 215).

district court is not reported but is in record pages 191–196.

JURISDICTION

The judgment of the Circuit Court of Appeals now sought to be reversed was entered on August 30, 1940 (R. 213). Mr. Justice Douglas on November 22, 1940, extended the time for filing this petition for writ of certiorari to January 29, 1941, pursuant to the act of February 13, 1925 (43 Stat. 940). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 938).

QUESTION PRESENTED

In 1866, the United States granted certain lands in northwestern Arizona to a railroad. These lands are within the area acquired by the United States from Mexico by the Treaty of Guadalupe Hidalgo. It is admitted by the pleadings that on the effective date of the grant the lands were occupied by the Walapai Tribe of Indians which has occupied them from time immemorial, prior to and during Spanish, Mexican, and United States sovereignty. The Walapai Tribe now occupies said lands and has never voluntarily ceded or relinquished its claimed right of occupancy.

The question is:

Whether under the allegations of the complaint the tribe has a right of occupancy in the land described, or any part of it, so that any title acquired by the railroad is subject to that right.

STATUTES, TREATY, AND EXECUTIVE ORDER INVOLVED

The pertinent portions of the act of September 4, 1841 (5 Stat. 453), the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922), the act of July 22, 1854 (10 Stat. 308), the act of March 3, 1865 (13 Stat. 541, 559), the act of July 27, 1866 (14 Stat. 292), the act of July 15, 1870 (16 Stat. 291, 304), the act of March 3, 1871 (16 Stat. 544, 566), appear in the Appendix. The Executive order of President Chester A. Arthur, January 4, 1883 (1 Kappler, Indian Affairs, Laws and Treaties (2d ed. 1904) 804), and the full text of the act of February 20, 1925 (43 Stat. 954), also appear in the Appendix.

STATEMENT

This suit was brought by the United States in its own behalf and as guardian of the Walapai Tribe of Indians to enjoin defendant from claiming any interest in or interfering with the possession and occupancy of the Walapai Tribe of lands in northwestern Arizona, within the area acquired from Mexico by the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922) (R. 2, 19–21). The defendant moved to dismiss the complaint on the ground that matters of which the court could take judicial notice showed that the defendant owned the unburdened fee simple title to the lands (R. 24, 25). The motion was granted; the complaint was dismissed (R. 190, 196), and the plaintiff appealed to the Circuit Court of Appeals of the Ninth Cir-

suit (R. 196). The Court of Appeals affirmed on the ground that the Walapai and other tribes of the Mexican cession did not have any right of occupancy under the public policy of the United States in the absence of an affirmative recognition by the United States of such a right and the United States did not recognize rights of occupancy in that area.

Since 1919, the rights of the Walapai Tribe, as against the defendant, to the land included in this suit, have been investigated by the Department of the Interior and the Senate Committee on Indian Affairs. The Senate Committee held hearings, caused historical documents to be collected, and published the whole as Walapai Papers (S. Doc. 273, 74th Cong., 2d sess., 1936). The Walapai Tribe claimed the land because it had occupied it continuously from pre-Spanish times, and its right was recognized in part when a reservation was established for it on July 8, 1881, and confirmed on January 4, 1883 (R. 4, 5). The railroad claimed odd-numbered sections of the land under a grant to the Atlantic and Pacific Railroad Company, to which defendant is successor, by act of July 27, 1866 (14 Stat. 292). On September 16, 1931, the Solicitor of the Department of the Interior wrote an opinion recognizing that the Walapai and other Indians in the Mexican cession had the usual Indian rights of occupancy, but declaring that the meager information then available was inadequate to establish an Indian title in the Walapai Tribe

to the odd-numbered sections, growing out of use and occupancy, which would defeat the railroad grant (Walapai Papers 319). The Assistant Attorney General, on November 12, 1931, while cautioning that it was impossible to state definitely what the result of a court proceeding might be, agreed informally with the Solicitor of the Department of the Interior (Walapai Papers 325). On June 17, 1932, after hearings, the Chairman of the Senate Committee on Indian Affairs wrote the Secretary of the Interior that evidence had been submitted to the Committee which might cause a different conclusion to be reached, and requested that no further action be taken under the act of February 20, 1925 (43 Stat. 954) (which authorized the exchange of any privately owned lands within the Walapai Reservation for Indian lands), to exchange the Indian lands for railroad lands until a searching inquiry had been made into the rights of the Walapai Indians (Walapai Papers 356).

Thereafter, this suit was instituted. The complaint stated two causes of action, one relating to lands within the Walapai Reservation, and the other relating to lands outside the Walapai Reservation. The complaint alleged that the Walapai Indians are tribal Indians and wards of the Government (R. 3); that the United States owns all of the lands for the use of the Walapai Tribe (R. 3, 10, 15, 16); that the lands in the first cause of action were set apart as a military reservation for

the Walapai Tribe by Army officials on July 8, 1881, and on January 4, 1883, President Arthur, by Executive order, reserved the same lands for the Walapai Tribe (R. 4, 5, 6, 7). It was alleged and admitted that the Walapai Tribe has continuously occupied and had possession of all of the lands, from time immemorial until the filing of the complaint, as its ancestral home (R. 8, 9, 14, 15, 16). It was further alleged that on July 27, 1866, and on March 12, 1872, the date when Atlantic and Pacific Railroad Company filed its map of definite location, the lands were subject to the claim and right of occupancy of the Walapai Tribe, which right was never voluntarily ceded or extinguished (R. 8, 15, 16, 17); that the railroad had not constructed its railroad through the Walapai Reservation up to January 4, 1883, as required by act of July 27, 1866, *supra* (R. 9). Patents have been issued to defendant to the odd-numbered sections outside the reservation under a mistake of fact and of law, but no patents have been issued to the defendant for lands within the reservation (R. 18). The defendant continually trespasses, and threatens to exclude the Government and Walapai Tribe from the odd-numbered sections (R. 8, 16). The prayer asked that it be declared that the grant was subject to the continued right of occupancy of the Walapai Tribe; and that defendant be enjoined from asserting any interest in the land and from trespassing (R. 19, 20).

REASONS FOR GRANTING THE WRIT

I

THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY DIRECT DECISION OF THIS COURT

In holding that an Indian tribe which had continuously occupied lands in the area ceded by Mexico under the Treaty of Guadalupe Hidalgo (9 Stat. 922), from pre-Spanish times to the filing of the complaint, and had never voluntarily relinquished or ceded its rights, had no right to continue its occupancy of the same lands as against a railroad claiming unencumbered ownership of odd-numbered sections under a grant of public lands from the United States, the Circuit Court of Appeals passed on a novel and important question of Indian law which has not been, but should be settled by this Court.

The case presented a question which the court below was required for the first time to pass upon, and in its decision the court below did not purport to follow any of the decisions of this Court. Indeed, the Circuit Court cited no authority on the rights of these and other Indians in the Mexican cession who had occupied lands from pre-Spanish times. Nor did it cite any authority for its conclusion that Indians had no rights of occupancy under Spanish or Mexican law. Although the court conceded the universal rule, that Indian tribes in all other areas had a right of occupancy

similar to the right claimed for the Indians in this case, no factual reason was given for distinguishing between tribal rights in the Mexican cession and in other areas.

II

THE DECISION BELOW APPEARS TO BE IN CONFLICT WITH ANALOGOUS DECISIONS OF THIS COURT

This Court has held so frequently that the Indian right of occupancy claimed in this case exists everywhere else in the United States, without making any qualification or limitation on the rights, that it was unreasonable for the court below to hold that similar rights do not exist in the Mexican cession.[1] This Court has not passed expressly upon the rights which Indian tribes have to the lands they occupied when the Mexican cession came to this country. It has determined that the Federal Government respected the Indian right of occupancy in California, within the Mexican cession, in holding that public lands in California occupied by individual Indians, who had no right to preempt the lands, were excluded from a railroad grant similar to the act of July 27, 1866 (14 Stat. 292).[2] This

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[1] *Johnson* v. *McIntosh*, 8 Wheat. 543; *Worcester* v. *Georgia*, 6 Pet. 515; *Mitchel* v. *United States*, 9 Pet. 711; *Wilcox* v. *Jackson*, 13 Pet. 498; *United States* v. *Cook*, 19 Wall. 591; *Beecher* v. *Wetherby*, 95 U. S. 517; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55; *Spalding* v. *Chandler*, 160 U. S. 394; *Minnesota* v. *Hitchcock*, 185 U. S. 373.

[2] *Cramer* v. *United States*, 261 U. S. 219, 227.

Court has held that lands not in the Mexican cession, occupied by Indians, do not pass to a railroad under a grant. *Leavenworth, Lawrence, and Galveston Railroad Co.* v. *United States*, 92 U. S. 733, *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283. This Court has also held that under a railroad grant which provided for extinguishment of Indian titles otherwise than by voluntary cession of the Indians, the title to the land included within the grant passed to the railroad, but the title was subject to the continued right of the Indians to occupy the land until their title was extinguished by the United States. *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55. See *United States* v. *Northern Pacific Ry. Co. et al.*, decided December 16, 1940 (pp. 19, 20).[3]

The decision below gives the Indians in the Mexican cession a status and rights inferior to the status and rights of Indians in other

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[3] The Indian right of occupancy was protected and enforced in *Buttz* v. *Northern Pacific Railroad*, *supra*, in territory included in the Louisiana Purchase which was under Spanish sovereignty from the Treaty of Fontainbleau, November 3, 1762 (13 Register of Debates, pt. 2, 24th Cong., 2d sess., appendix 226 (1837)), until the treaty between France and Spain, October 1, 1800 (Binger Hermann, The Louisiana Purchase 17, 26 (Govt. Ptg. Off. 1898)). Although the Louisiana Purchase was proclaimed by this country October 31, 1803 (2 Stat. 245), the transfer of possession was almost directly from Spain to the United States, inasmuch as French governors occupied New Orleans for only 20 days between the Spanish and American occupations (Binger Hermann, The Louisiana Purchase 34).

parts of the country, whereas previous efforts to set Indians in the Mexican cession apart from other Indians have been rejected by this Court. It has held that Indians in the Mexican cession are under the guardianship of the United States and the Indian liquor laws apply to them, *United States* v. *Sandoval*, 231 U. S. 28; that the tribes have the right to sue to prevent sale of their lands, *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110; and that a conveyance of Indian interests in land within the Gadsden Purchase, where the Government claimed the lands were public lands subject to the ordinary right of Indian occupancy, was invalid because it was not approved by the Government as required by Revised Statutes, section 2103, and Revised Statutes, section 2116, whether the Indians were Pueblos or nomadic, *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315.

III

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ERRONEOUS

It is submitted that the decision below is erroneous for the following reasons:

1. The court below concedes (R. 206) that it has been the policy of the United States to accord to Indian tribes a right to occupy the lands they have claimed and occupied from time immemorial. It has denied, however, that that policy is applicable in the case of the tribes of the Mexican cession. However, there is no sound reason for such a dis-

crimination against the latter tribes. In all other matters tribes in the Mexican cession have the same legal status and the same rights of self government as tribes elsewhere. It has been recognized by the courts,[4] and by the executive departments of the Government[5] that no legal distinction exists between these tribes and the tribes in other parts of the country. If the reason for according occupancy rights to Indian tribes was "upon the policy of maintaining just and peaceable relations with the Indians," as the court below said (R. 206), that reason existed as strongly in the Mexican cession as in any other area. For it has been judicially determined that tribes in the Mexican cession[6] and particularly the Walapai Tribe (*Lake* v. *United States*, 35 Ct. Cls. 15 (1899)) have the political capacity to make war upon the United States, which they have in fact done.

2. The court below has held that, in the absence of affirmative recognition by the United States of the right of occupancy claimed by the Walapai

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[4] *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Sandoval*, 231 U. S. 28; *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110; *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315; *United States* v. *Walker River Irr. Dist.*, 104 F. (2d) 334 (1940).

[5] Report of Comm. of Indian Affairs (1872), p. 82; Walapai Papers 196; 54 I. D. 359 (1934); see 25 L. D. 408 (1897).

[6] *Collier* v. *United States*, 173 U. S. 79; *Barrow, Porter & Co.* v. *United States, Mohave, Cosnejo, and Navajo Indians*, 30 Ct. Cls. 54 (1895); *Tully* v. *United States*, 32 Ct. Cls. 1 (1896); *Scott* v. *United States and Apache Indians*, 33 Ct. Cls. 486 (1898).

Tribe, no such right exists. However, this Court has expressly held, and with particular reference to Indians of the Mexican cession, that affirmative recognition is not a *sine qua non* of the existence of the Indian right of occupancy. In *Cramer* v. *United States*, 261 U. S. 219, it said (p. 229):

> The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy.

Cf. Central Pacific Ry. Co. v. *Alameda County*, 284 U. S. 463.

Moreover, even if affirmative recognition were necessary, the court below has entirely ignored statutes and treaties involving such recognition.[7]

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[7] Treaty of Guadalupe Hidalgo, February 2, 1848, Art. XI (9 Stat. 922) (protection secured to Indian tribes as regards their aboriginal homes); act of February 27, 1851, sec. 7 (9 Stat. 574, 587) (Indian trade and intercourse laws extended to New Mexico); act of July 22, 1854, sec. 7 (10 Stat. 308) (laws prohibiting preemption of Indian lands prior to extinguishment of Indian title extended to New Mexico); act of February 23, 1865 (13 Stat. 432) (authorized the Government to acquire Indian possessory rights in Utah); act of July 27, 1866, sec. 2 (14 Stat. 292) (authorized the Government to extinguish Indian titles on route of Atlantic and Pacific Railroad); treaties of September 9, 1849 (9 Stat. 974), and June 1, 1868 (15 Stat. 667) (Navajo Indians surrendered rights to their country, reserving hunting rights); act of July 16, 1894 (28 Stat. 108) (Utah disclaimed rights to lands held by Indians); act of June 20, 1910 (36 Stat. 557) (New Mexico and Arizona disclaim title to Indian lands). See Walapai Papers, 357–359 (appropriations for Walapai Tribe).

No stronger recognition could possibly be given by the Government than to permit the Walapai Tribe to continue a physical occupation of the land as was done in this case. Yet, the decision below would authorize the railroad to remove the Indians from the lands when no political department of the Government has required them to surrender possession.

3. After holding that affirmative recognition of the asserted right of occupancy was required but was not present in this case, the court below went on to declare that there had in fact been a positive denial of that right. It discovered the existence of such a denial by a process of construction of, and the drawing of inferences from, statutes and governmental action, only part of the latter being a matter of record. However, the materials on which the court relied do not show any denial of the existence of the right of occupancy here asserted. For example, the court below referred (R. 207) to the act of July 22, 1854 (10 Stat. 308), terming it "one of the most significant pieces of legislation by Congress in this connection." But, far from proving a denial of the existence of the right of occupancy, that act confirmed its existence. For section 7 of that act extended section 10 of the Preemption Act of September 4, 1841 (5 Stat. 453), to New Mexico, thereby permitting preemption rights to be initiated only on lands not subject to Indian title.

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Nor does the establishment of the Lower Colorado River Reservation (act of March 3, 1865, 13 Stat. 541, 559) show any such denial. It is not plain that that reservation was created for the Walapai Indians, because they were mountain Indians and not "Indians of said river and its tributaries" within the terms of the act.

The fact that the military authorities may have removed some of the Walapai Indians to that reservation in 1874 (R. 211) can hardly be conclusive proof that the Lower Colorado River Reservation was established for the Walapai Tribe. Nor would such military action amount to a denial of the existence of a right of occupancy or cause the loss of any rights. *Fort Berthold Indians* v. *United States*, 71 Ct. Cls. 308 (1930). The doctrine that forcible removal of individuals of a particular race to military camps results legally in a loss of property rights has no place in the law of the United States. This Court has held that the exercise of military force against Indians is not the true measure of their legal rights. *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111. Certainly, the forcible removal of the Walapais in 1874 was entirely deprived of significance as a denial of the right of occupancy when in 1875 (Walapai Papers 104, 108) the same military authorities permitted the Walapais to return to their accustomed abodes and in 1881 established the Walapai military res-

ervation for their use. Equally plain, the act of February 20, 1925 (43 Stat. 954), does not show a denial of occupancy right, notwithstanding the contrary reasoning of the court below (R. 211–212). That act merely authorized the exchange of privately owned and Indian lands within the Walapai Reservation if there were any privately owned lands therein.

In short, there has been no positive denial of the right of occupancy of the Walapai Tribe. If there were, it would appear unmistakably because Congress would have expressly so declared and not left the matter open to be discerned only by an intricate process of statutory construction and implication. 34 Op. Atty. Gen. 171, 172. *Cf. Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733, 740.[5]

4. The decision below is based almost wholly on the holding that the Indians of the Mexican cession other than in "exceptional instances" had no rights whatever under Spanish and Mexican law. That holding, it is remarkable to note, was in reality no more than an assumption because not a single authority was cited in support of it. Furthermore, it is entirely unsound. The Spanish and Mexican law accorded to Indian tribes rights of

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[5] The Atlantic and Pacific Railroad Company, predecessor of the defendant, also recognized outstanding Indian occupancy titles along its proposed route. *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413.

occupancy substantially similar to those accorded generally to Indian tribes by the United States.[9] With regard to Indian tribes occupying lands acquired by the United States from Spain other than the Mexican cession, this Court has repeatedly recognized that such tribes have rights of occupancy *Mitchel* v. *United States*, 9 Pet. 711; *Chouteau* v. *Molony*, 16 How. 203; *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Perchemau*, 7 Pet. 51, 86.[10] And, it may also be noted that with particular reference to the lands of the Mexican cession, this Court has also recognized in *Cramer* v. *United States*, 261 U. S. 219, that Indians had rights of occupancy.

5. In its decision, the Circuit Court of Appeals invoked the doctrine of judicial notice to preclude the Government from offering evidence on important issues in the case. It did this by taking notice not only of evidence and conclusions of fact presented by the defendant but of the broad proposi-

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[9] Indian Land Cessions in the United States, vol. 18, pt. 2, Bureau of American Ethnology (H. R. 118, 56th Cong., 1st sess. (1899) 539-545); Hall's Laws of Mexico, secs. 36, 38, 40, 45, 49, 85, 195; 2 White's Recopilacion 34, 50, 51, 54, 59, 95, 98; Franciscus de Victoria (1480–1546), De Indis et de Ivre Belli Relectiones, Classics of International Law, Carnegie Institution (1917), 128, 137-139, 149.

[10] As a matter of fact, *Johnson* v. *McIntosh*, 8 Wheat. 543, 574, decided that the Indian occupancy doctrine had received universal recognition; *Worcester* v. *Georgia*, 6 Pet. 515, 544, decided that the principle was acknowledged by all European nations and referred to it as the common law of European sovereigns respecting America.

tion that no countervailing evidence could possibly be produced, and no contrary facts could be established, by the plaintiff.

The court below and the defendant assert that "in exceptional instances as in the case of the lands of the Pueblo Indians" (R. 206) some Indian tribes enjoyed recognized rights to lands in the Mexican cession. The question whether the Walapai Tribe falls within the class of exceptional instances involves a conclusion of fact which may turn upon whether the Walapai Indians were mere nomadic wanderers or whether they actually occupied the area as alleged in the complaint. The obscurity of this question is shown by the failure of the Surveyor General for the Territory of New Mexico in 1858 to report the existence of at least three communities or groups of Indians in the Mexican cession, two of which (Santa Ana and Zuni) subsequently had their possessory rights confirmed by Congress (act of February 9, 1869, 15 Stat. 438; act of March 3, 1931, 46 Stat. 1509), and one of which—a community of Papago Indians whose manner of living is similar to that of the Walapai Tribe—has never been expressly accorded any "Pueblo" rights by Congress, but has been recognized by this Court as having a right to sue with respect to community land claims. *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110; *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315. On issues of this sort the United States and the

Walapai Indians deserve a day in court and an opportunity to present evidence.

In dismissing this case, the trial court acted upon a motion to dismiss buttressed by a 58-page memorandum of points and authorities (R. 26–84), 10 supplementary appendices (R. 85–145), and excerpts from a brief in another case with its own appendices (R. 145–189), and concluded that the plaintiff could not possibly produce evidence refuting the matters of which the court took judicial notice (R. 195). Even if the court was justified in taking judicial notice of facts thus produced by the defendant which the plaintiff has had no opportunity to rebut or explain by evidence—a practice condemned as indefensible (9 Wigmore on Evidence (3d ed. 1940) secs. 2565–2567)—and even if the court below was justified in extending the scope of judicial notice to difficult and controversial issues of anthropology with respect to the land tenure of an obscure Indian group and to equally difficult issues of history with respect to administrative acts of the Government that were only occasionally matters of record, the court was unjustified in holding, in the guise of judicial notice, that there was nothing more to be said on the subject and that the inadequate and one-sided collection of reports presented by the defendant could not possibly be supplemented by any countervailing evidence. Such a use of judicial notice is unprecedented and unjustifiable. *Ohio Bell Tel.*

Co. v. *Comm.* 301 U. S. 292, 300; 9 Wigmore on Evidence (3d ed. 1940) secs. 2565–2567.

IV

IMPORTANCE OF THE CASE

The decision below presents an important question of Indian law in a vast area which contains a large number of Indian tribes. There are tribes of Pueblo Indians, the Navajo Tribe, the Utes, the Apaches, the Papagos, the Pimas, the Mohaves, the Yumas, the Paiutes, the Maricopas, and the Walapai, among others, in the Mexican cession, and the decision is a matter of great concern to them and to the public generally in the Southwest. These tribes and consequently their neighbors in the Southwest are affected by the decision, not alone in their land rights, but by implication in their water rights. It comes as startling and deeply upsetting news to the Indians in the Mexican cession and the Gadsden Purchase that they never had any possessory rights to the lands which are their homes; that they are discriminated against by being given an inferior status to other Indians in the United States.

The decision is also of great importance to the Department of the Interior. Successive Solicitors of that Department have recognized aboriginal Indian occupancy rights in the Mexican cession, Walapai Papers 196; 54 I. D. 359 (1934) (see Report of Commissioner of Indian Affairs

(1872), p. 82), and for many years the Department has administered all of the Indian lands in the area upon the belief that the Indians there had the same rights of occupancy as Indians elsewhere. The physical administration of the lands in the Mexican cession, the protection of their soil covering, the preservation of their waters and watersheds are all affected in the decision. If the United States does not own the lands involved in this suit, the Department of the Interior will be confronted with another Indian tribe without adequate lands. It is essential to the administration of the affairs and property of the United States and the Indians in the Mexican cession that this Court review the decision of the Court of Appeals which appears to be directly contrary to the understanding on which the Department of the Interior has acted over a period of many years.

Finally, the suit was instituted as a means of complying with the request of the Senate Committee on Indian Affairs (Walapai Papers 356) that there be a searching, final determination of the rights of the Walapai Tribe before further action is taken toward the consolidation and exchange of reservation lands under the act of February 20, 1925 (43 Stat. 954), and before drastic steps to remove the Walapai Indians, or to exchange the lands, are taken, and to comply with the Senate Committee's request, this Court should review the decision of the Circuit Court of Appeals.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

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The Solicitor General authorizes the filing of this petition.

Francis Biddle
Solicitor General

January 1941.

APPENDIX

The pertinent provisions of the act of September 4, 1841 (5 Stat. 453, 455, 456), are:

> SEC. 10. *And be it further enacted*, That from and after the passage of this act, every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration of intention to become a citizen, as required by the naturalization laws, who since the first day of June, A. D. eighteen hundred and forty, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions: * * * no lands included in any reservation, by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or for other purposes; no lands reserved for the support of schools, nor the

> lands acquired by either of the two last treaties with the Miami tribe of Indians in the State of Indiana, or which may be acquired of the Wyandot tribe of Indians in the State of Ohio, or other Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this act * * *.

The pertinent provisions of the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922, 929, 930), are:

> ART. VIII. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.
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> * * * * *
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> In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.
>
> ART. IX. Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the

Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

* * * * *

ART. XI. Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the Government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the Government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said Government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two Republics; nor to purchase or acquire horses, mules, cattle, or property of any kind stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the Government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them and return them to their country, or deliver them to the agent or representative of the Mexican Government. The Mexican authorities will, as far as practicable, give to the Government of the United States notice of such captures; and its agents shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the meantime, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the Government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy; thereby affording the security and redress demanded by their true spirit and intent, the Government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said Government when providing for the removal of the Indians from any portion of

the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

* * * * *

The pertinent provisions of the act of July 22, 1854 (10 Stat. 308), are:

An Act to establish the offices of Surveyor General of New Mexico, Kansas, and Nebraska, to grant Donations to actual Settlers therein, and for other purposes:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, by and with the advice and consent of the Senate, shall be, and he is hereby, authorized to appoint a Surveyor General for New Mexico, whose annual salary shall be three thousand dollars, and whose power, authority, and duties shall be the same as those provided by law for the Surveyor General of Oregon; * * *

SEC. 2. *And be it further enacted*, That, to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who was residing in said Territory prior to the first day of January, eighteen hundred and fifty-three, and who may be still residing there, there shall be, and hereby is, donated one quarter section, or one hundred and sixty acres of land. And to every white male citizen of the United States, or every white male above the age of twenty-one years, who

has declared his intention to become a citizen, and who shall have removed or shall remove to and settle in said Territory between the first day of January, eighteen hundred and fifty-three, and the first day of January, eighteen hundred and fifty-eight, there shall in like manner be donated one quarter section, or one hundred and sixty acres, on condition of actual settlement and cultivation for not less than four years: *Provided, however,* That each of said donations shall include the actual settlement and improvement of the donee, and shall be selected by legal subdivisions, within three months after the survey of the land where the settlement was made before the survey; and where the settlement was made after the survey, then within three months after the settlement has been made; and all persons failing to designate the boundaries of their claims within that time, shall forfeit all right to the same.

SEC. 3. *And be it further enacted,* That, on proof of the settlement and cultivation required by this act, to the satisfaction of the surveyor general, or other officer designated by law for that purpose, subject to the supervision of the Secretary of the Interior, a certificate shall be issued to the party entitled, on presentation of which, if approved by the Secretary of the Interior, a patent shall issue thereon: * * *

SEC. 4. *And be it further enacted,* That none of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, or lands settled on and occupied for purposes of trade and commerce, and not for agriculture, and all legal subdivisions settled on and occupied, in whole or in part, for purposes of trade and commerce, and not for

agriculture, shall be subject to the provisions of the act of twenty-third of May, eighteen hundred and forty-four, in relation to town sites on the public lands, whether so settled and occupied before or after the survey of said lands, except that said lands shall be donated instead of being sold.

* * * * *

SEC. 7. *And be it further enacted*, That any of the lands not taken under the provisions of this act shall be subject to the operation of the Preemption Act of fourth September, eighteen hundred and forty-one, whether settled upon before or after the survey; and, in all cases where the settlement was made before the survey, the settler shall file his declaration within three months after the survey is made and returned; and any person claiming a donation under this act shall be permitted to enter the land claimed by him at any time prior to the four years' occupancy and cultivation required, by paying therefor at the rate of one dollar and twenty-five cents per acre, and proving occupancy and cultivation up to the time of such payment.

SEC. 8. *And be it further enacted*, That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the

treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

* * * * *

SEC. 10. *And be it further enacted*, That the President of the United States shall be and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, a Surveyor-General for the Territories of Nebraska and Kansas, who shall locate his office at such place as the President of the United States shall from time to time direct, and whose duties, powers, obligations and responsibilities and compensation shall be the same as those of the Surveyor-General of Wisconsin and Iowa, and who shall be allowed the same amount for office

rent, fuel, incidental expenses, and clerk hire, as is allowed to said Surveyor-General of Wisconsin and Iowa.

* * * * *

SEC. 12. *And be it further enacted*, That all the lands to which the Indian title has been or shall be extinguished within said Territories of Nebraska and Kansas, shall be subject to the operations of the Preemption Act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned; *Provided, however*, That where unsurveyed lands are claimed by preemption, notice of the specific tracts claimed shall be filed within three months after the survey has been made in the field, and on failure to file such notice or to pay for the tracts claimed before the day fixed for the public sale of the lands by the proclamation of the President of the United States, the parties claiming such lands shall forfeit all right thereto: *Provided*, said notices may be filed with the Surveyor-General, and to be noted by him on the township plats, until other arrangements shall have been made by law for that purpose.

SEC. 13. *And be it further enacted*, That the public lands in the Territory of Nebraska, to which the Indian title shall have been extinguished, shall constitute a new land district to be called the Omaha District; and the public lands in the Territory of Kansas, to which the Indian title shall have been extinguished, shall constitute a new land district, to be called the Pawnee District: the officers for each of which districts shall be established at such points as the President may deem expedient * * *.

The pertinent provisions of the act of March 3, 1865 (13 Stat. 541, 559), are:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

The pertinent provisions of the act of July 27, 1866 (14 Stat. 292), are:

Section 1 created named persons and their future associates as a corporation named Atlantic and Pacific Railroad Company, and empowered the corporation—

> * * * to lay out, locate, and construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River, thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be *be* selected by said company for crossing; thence by the most practicable and eligible route, to the Pacific. * * *
>
> SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the

said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, sidetracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of

land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in

odd-numbered sections nearest to the line of said road, and within twenty miles thereof may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the

additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

* * * * *

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station houses, or any other structures

required in the construction and working of said road. * * *

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

* * * * *

SEC. 12. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this Act, and not afterwards, and shall be

deposited in the office of the Secretary of the Interior.

* * * * *

SEC. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: *Provided*, That any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

* * * * *

The pertinent provisions of the act of July 15, 1870 (16 Stat. 291, 304), are:

For surveying the public lands in Arizona, at rates not exceeding fifteen dollars per lineal mile for standard lines, twelve dollars for township, and ten dollars for section lines, ten thousand dollars: *Provided*, That it shall be the duty of the surveyor-general of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory under the laws, usages, and customs of Spain and Mexico; and for this purpose he shall have all the powers conferred, and shall perform all the duties enjoined upon the surveyor-general of New

> Mexico by the eighth section of an act entitled "An act to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes," approved July twenty-second, eighteen hundred and fifty-four, and his report shall be laid before Congress for such action thereon as shall be deemed just and proper.

The pertinent provisions of the act of March 3, 1871 (16 Stat. 544, 566), are:

> * * * *Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

The Executive order of President Chester A. Arthur, of January 4, 1883 (1 Kappler, Indian Affairs, Laws and Treaties, 2d ed., 1904, p. 804), reads:

> It is hereby ordered that the following-described tract of country situated in the Territory of Arizona be, and the same is hereby, set aside and reserved for the use and occupancy of the Hualpai Indians, namely: Beginning at a point on the Colorado River 5 miles eastward of Timakah Spring; thence south 20 miles to crest of high mesa; thence south 40 degrees east 25 miles to a point of Music Mountains; thence east 15 miles; thence north 50 degrees east 35 miles; thence north 30 miles to the Colorado River; thence along said river to the

place of beginning; the southern boundary being at least 2 miles south of Peach Spring, and the eastern boundary at least 2 miles east of Pine Spring. All bearings and distances being approximate.

The act of February 20, 1925 (43 Stat. 954), provides:

> CHAP. 273. An Act To provide for exchanges of Government and privately owned lands in the Walapai Indian Reservation, Arizona.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior is hereby authorized, in his discretion, under rules and regulations to be prescribed by him, to accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation in Mohave and Coconino Counties, Arizona, and to permit lieu selections within the boundaries of the said reservation by those surrendering their rights so that the lands retained for Indian purposes may be consolidated and held in a solid area so far as may be possible: *Provided*, That the title or claim of any person or company who refuses to reconvey to the Government shall not be hereby affected.

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No. 717

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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INTRODUCTORY STATEMENT

Several days after filing the petition in this case, the Interior Department received an indenture, dated January 23, 1941, whereby the respondent quitclaimed to the United States all the lands to which the first cause of action relates. These are lands within the Walapai Reservation, in contrast to those outside the reservation which are covered by the second cause of action. Respondent executed this quitclaim in order to obtain certain benefits under the Transportation Act of Septem-

ber 18, 1940 (Public, No. 785, 76th Cong.), which were conditional upon the release of its claims to unpatented lands (Respondent's Brief, Appendix, pp. 15–16). It happens that the lands claimed by the railroad within the reservation were never patented while those outside the reservation were patented. Hence, the quitclaim, being limited to unpatented lands, covered only lands within the reservation. The quitclaim thus has no relevance to the merits of the pending action and does not represent a concession by either party with respect to the merits of the pending suit.

Respondent's brief, however, appears to rely on this quitclaim inferentially as the mainstay of its opposition to the petition for certiorari. Respondent apparently assumes, in the first place, that the quitclaim eliminates the first cause of action from the case. Upon this assumption, respondent presents arguments against the granting of certiorari which are directed solely to the second cause of action, and which, therefore, even if true, would not support the conclusion they are designed to bear. Finally, respondent ignores the principal arguments presented by the petition in support of the grant of certiorari, apparently assuming that these arguments relate only to a cause of action that has been eliminated by the quitclaim. This is a double error, for (a) the arguments of the petition apply to *both* causes of action, and (b) neither one has been eliminated by the quitclaim.

I

THE QUITCLAIM DOES NOT ELIMINATE THE FIRST CAUSE OF ACTION OR DETRACT FROM ITS IMPORTANCE

The respondent's assumption that the quitclaim eliminates the first cause of action or renders it unimportant is palpably erroneous.

In the first place, the first cause of action specifically alleges various trespasses by the respondent involving the use or leasing of the lands covered therein (R. 8); and the general prayer for relief, applicable to both causes of action, demands an accounting "for all rents, issues and profits derived from the leasing, renting, or use of lands subject to said right of occupancy by said Hualapai tribe" (R. 20). If the respondent was a trespasser prior to January 23, 1941, it cannot render a suit for accounting moot by executing a quitclaim deed to the property from which rents, issues and profits have been unlawfully derived.

In the second place, the quitclaim of reservation lands does not in any way reduce the importance of a favorable or unfavorable decision on the present petition or on the merits of the case so far as the *Indians* are concerned. Notwithstanding that the railway company may have no further interest in these lands, the fact remains that the United States in its capacity as guardian of the Walapai Tribe is seeking in this action to secure an adjudication of the "right of occupancy and use" of the tribe (R. 19-20), and the execution of a quitclaim deed to the United States does not give the Walapai Tribe the relief which it seeks. In fact, if the deci-

sion of the court below that the Walapai Indians have no rights of occupancy and use in the lands within the reservation so quitclaimed is to be made final by the denial of this petition for certiorari, it may be doubted whether, under existing law,[1] the United States can continue to treat the quitclaimed areas as part of the Walapai Reservation. Thus, the quitclaim of January 23 does not detract in any way from the practical need, or from the legal justification, of a determination that the lands within the reservation are subject to rights of Indian occupancy, as alleged in the complaint.

II

THE QUITCLAIM DOES NOT FILL THE GAP IN RESPONDENT'S ARGUMENT

The entire argument of the respondent's brief is directed to establishing that the decision of the courts below was correct *in so far as it relates to the second cause of action.* Respondent apparently relies upon the quitclaim to buttress the conclusion that even though the decision below may have been erroneous as to the first cause of action any such error has been rendered harmless by the quitclaim. In this vein respondent takes the liberty of reformulating the issue presented by the petition as an issue involving only "lands, not within a reservation" (Respondent's Brief, p. 5). In this vein respondent argues that precedent and policy justify limiting Indian possessory rights to Indian

[1] Act of May 25, 1918, 40 Stat. 561, 570, 25 U. S. C. 211.

reservations (Respondent's Brief, p. 6), cites authorities pertinent only to nonreservation claims (p. 7), distinguished as irrelevant petitioner's authorities dealing with reservation rights (pp. 8-9), and argues that failure to limit Indian rights to reservation lands would undermine the policy of opening Mexican cession lands to settlement, would detract from railroad grants given in good faith, and would destroy the tax structure and the security of titles in the Southwest (pp. 10–13). These arguments are refuted by authorities cited in the petition, and petitioner hopes to have an opportunity to deal with them in detail, on the merits, at some future time. For the present, it is sufficient to point out that even if these arguments were all valid, they would fail to demonstrate the propriety of the decision below on the first cause of action. On the contrary, the very limitations recognized in the authorities that respondent cites (Brief, pp. 8, 11, 12, 13) indicate that the courts below were wrong in denying the possibility of Indian possessory rights in the reservation area covered by the first cause of action. Since that cause of action is, as has been shown, not moot, the respondent's quitclaim cannot properly be used to fill the gap in its argument against the granting of the writ here sought.

III

THE QUITCLAIM DOES NOT ANSWER THE ARGUMENTS OF THE PETITION

Respondent not only couches its argument as if the first cause of action had been eliminated from

the case, but appears to assume further that the principal reasons advanced in the petition in support of the granting of certiorari apply *only* to this supposedly eliminated cause of action. If these assumptions were true, respondent would perhaps be justified in dismissing without argument, or ignoring, the principal arguments presented in the petition in his answering brief. A brief reference, however, to the arguments presented in the petition which are thus passed over will demonstrate (a) that these arguments apply to *both* causes of action, and (b) that the quitclaim does not answer any of these arguments.

(1) The petition presents the issue whether lands within the Mexican cession are subject to the rule established by this Court, without geographical qualification, under which aboriginal occupancy creates rights against all but the United States, until extinguished by the United States (Petition, pp. 10–11; R. 206). Without arguing this issue at this time, it is proper to note that it is an issue upon which the decision of the courts below would establish a special area in which general rules laid down by this Court for the protection of Indians would be disregarded. The issue is therefore one upon which this Court should pass. The failure of respondent's brief to deal with this issue would, of course, be justified if it related to a question disposed of by the quitclaim. But the issue of possessory rights in Mexican cession lands is inherent in *both* causes of action, because it is relevant to

nonreservation lands as well as to reservation lands. To the resolution of this issue, therefore, the respondent's quitclaim, covering only reservation lands, is immaterial.

(2) Related to the foregoing issue, and equally unrelated to the quitclaim, is the question of whether Congress must act affirmatively and specifically to create Indian rights, or whether such rights may flow from such a general policy as was upheld by this Court in *Cramer* v. *United States*, 261 U. S. 219.

(3) In maintaining that any Indian rights that existed were terminated by various acts of Congress or actions of administrative officials, the courts below, and the respondent's brief, either cite as precedents radically different situations, where the permanent, continuous, exclusive possession alleged in this case was not found (Respondent's Brief, pp. 6–7), or give to railroad grant acts, State enabling acts, and military expeditions a force which this Court has denied in cases arising outside of the Mexican cession area (Respondent's Brief, pp. 11–13; R. 207–212). No reason has been advanced why any such statute or action should terminate Indian possessory rights within the Mexican cession area when similar laws and actions do not have this effect outside of this area (Petition, pp. 13–15). Again, the decision of the courts below and argument of the respondent would establish a special area in which rules laid down by this

Court for the protection of Indians would be disregarded. This issue is therefore one upon which this Court should render a decision. It is, finally, an issue inherent in both causes of action. To the resolution of this issue, therefore, the respondent's quitclaim is immaterial.

(4) The issue of whether the Indian Tribes of the Mexican cession area had acquired possessory rights under Spanish or Mexican sovereignty is an issue which has been before this Court only in cases in which such rights have been upheld (Petition, pp. 16–17). The court below (R. 206–207) and the respondent (Brief, pp. 9–10) pass over these cases or refer vaguely to them as "exceptional," although they nowhere meet the issue by pointing to any general rule, approved by this Court, to which this affirmative recognition of rights would be an exception. Failure to meet this issue cannot be justified on the theory that the issue has become moot in the case at bar. The issue is equally pertinent to both causes of action. To the resolution of this issue, therefore, the respondent's quitclaim is immaterial.

(5) Finally, this case presents the basic issue of whether the petitioner has been deprived of a fair trial by an improper extension of the doctrine of judicial notice (Petition, pp. 16–19). Petitioner does not question the right of the courts below to notice the various reports of officials and travelers which they have noticed, or even the propriety of

respondent's now asking this Court (Respondent's Brief, p. 2, fn. 1) to take judicial notice of the fact that in 1928 the Board of Indian Commissioners said that the neighbors of the Walapai Indians thought they were "squatters" in the nonreservation land they claim, together with other items of greater or less evidentiary weight. Petitioner does, however, protest that the proper scope of judicial notice is exceeded *if assertions in documents judicially noticed are taken to be proved, beyond all possibility of contradiction by countervailing evidence, merely because these assertions are contained in documents attached to a motion to dismiss a complaint instead of being offered in evidence during a trial, after issue joined.*

There are some questions as to which the fact that responsible Government officials make certain reports is relevant, as for instance in the constitutional question of whether the legislature may have had a reasonable basis for supposing that certain social conditions existed when it passed a given law. So it may be with other exceptional questions affecting constitutionality or jurisdiction, as in the two cases cited by the respondent upholding judicial notice addressed to pleadings (Respondent's Brief, p. 2). But the question of possession in this case is not of that character. Here the complaint alleges that the Walapai Tribe has at all material times held continuous and "exclusive" possession (Complaint, R. 4, 8, 9, 16) of

the lands described, and the courts below have reversed the normal rule that allegations of fact in a complaint are deemed true on demurrer and have concluded that contrary statements about the habits of these Indians made by various officials in documents attached to a motion to dismiss are to be deemed true and made the basis for adjudicating the issue against the Indians finally, and absolutely, and without a trial. Petitioner insists that all of the Government officials whose views are noticed by respondent and by the courts below are fallible human beings, that their respective views on Walapai possession are not entirely consistent, that the truth of any report or opinion on this subject is properly subject to proof, and that petitioner is entitled to a day in court on these issues.[2] As this Court said, *per* Cardozo, *J.*, in the case of *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292,

> * * * notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore,

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[2] These issues are themselves of such importance that an erroneous determination of them, even upon a full and fair such review needed when the determination of these issues trial, would call for review by certiorari. All the more is has been reached without any trial.

> Evidence, sec. 2567; 1 Greenleaf, Evidence, 16th ed., p. 18. "It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ibid.* Cf. *Shapleigh* v. *Mier*, 299 U. S. 468. Such at least is the general rule, to be adhered to in the absence of exceptional conditions. * * * Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial [pp. 301–302].

What Mr. Justice Cardozo pointed to as the vice of the lower court decision in the *Ohio Bell Telephone* case was—

> that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out [p. 302].

That, indeed, is the situation in the case at bar. Petitioner does not know to this day what facts the courts below took notice of when they concluded (R. 195–196, 212) that no possible evidence that petitioner might produce would show the kind of possession that would give rise to any possessory rights whatever within the area designated in the

complaint.* There must be some situations i which long-continued, exclusive, continuous posses sion (as alleged in Complaint, R. 4, 8, 9, 16) doe create possessory rights, because the courts belo (R. 206–207) and the respondent (Brief, pp. 9–10 refer to "exceptional" cases where, even in forme Mexican territory, such rights have been so create and recognized. But what kind of possession th petitioner would have to show—whether it woul be necessary to show the existence of farms, vi lages, or irrigation ditches, how continuous an how long such possession would have to be—a these matters are left in the realm of mystery by th use of "judicial notice" to cover a mixture of law fact, and hearsay evidence. Certainly, if the cri terion of aboriginal possession laid down by thi Court in other cases (R. 206) is rejected for th area of the Mexican cession, some equally definit

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* Repeatedly the respondent's brief (pp. 2, 11–14) and t opinion of the court below (R. 208–209) confuse the iss presented by the pleadings by arguing that Congress cou not have intended to withhold from disposition the whole the extensive area designated in the second cause of actio of the complaint, and inferring that therefore there are Indian rights in any part of the area. This argument is *non sequitur*. Petitioner seeks an opportunity to establis some possessory rights in this area. Even if the petitione on the trial, should succeed in proving permanent posse sion and possessory rights only in those villages or settl ments, outside the reservation, which the Walapai ha occupied from time immemorial and still occupy, the pet tioner would be entitled to a substantial judgment in i favor. Dismissal of the complaint precludes any suc proof.

criterion should be offered in its place. At least this is an issue upon which this Court should hear further argument. It is, like all the other issues presented by the petition, an issue inherent in *both* causes of action. To the resolution of this issue, therefore, the respondent's quitclaim is immaterial.

Other points raised by the petition (pp. 7–10) involve generalizations from the foregoing five specific points and are, therefore, equally unaffected by respondent's brief or by its quitclaim.

Finally, it should be said that neither the respondent's brief nor its quitclaim casts doubt upon the importance of the issues which this petition raises, issues which, as respondent concedes (Brief, pp. 13–14), will affect Indian possessory claims over a large area not directly at issue in this case.

Respectfully submitted,

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The Solicitor General authorizes the filing of this reply brief.

Francis Biddle

No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 23

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

I

The opinion of the Circuit Court of Appeals is reported in 114 F. (2d) 420 (C. C. A. 9th, 1940) and also appears in the record at pages 204 to 213. The "Supplemental Order and Opinion" of the District Court has not been reported. It is in the record at pages 191 to 196.

JURISDICTION

This suit was brought in the United States District Court for the District of Arizona by the

rights. As Chief Justice Marshall first declared in *Johnson v. McIntosh*, 8 *Wheat.* 543 (1823):

> These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. (*At* p. 574).[1]

The primary issue in this case, therefore, is whether the *Walapai* Indians had an enforceable right of use and occupancy in those lands which, on July 27, 1866, they had occupied continuously from time immemorial. The question of *what* lands, if any, the *Walapai* Tribe so occupied is a question of fact not raised by this appeal. For the purpose of establishing, on this appeal, the legal sufficiency of the complaint, it must be assumed that there *was* some such land. *Whether* or not such land actually embraced the entire acreage asserted in the complaint is immaterial at this stage of proceedings.

> B. This Court has continuously recognized that aboriginal possession creates a possessory right legally enforceable against everyone except the United States.

The protection of aboriginal possession has often been referred to as a matter of national policy. This is a half truth, misleading if policy is contrasted *with law*. The fact is that the exist-

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[1] See, in accord, *Worcester v. Georgia*, 6 Pet. 515, 546 (1832); *Beecher v. Wetherby*, 95 U. S. 517, 525 (1877); *Holden v. Joy*, 17 How. 211, 239 (1855).

occupancy had been recognized by treaty, statute, or otherwise. *Johnson v. McIntosh*, 8 Wheat. 543 (1823); *United States v. Shoshone Tribe*, 304 U. S. 111 (1938). The provision quoted, like the act itself, applied within a roughly located area from Missouri to the Pacific coast and the term "Indian title" applied equally to all lands within that area and hence to all Indian rights of occupancy which then existed within that area. The provision had the same meaning and application with respect to lands in the Mexican Cession area as with respect to any other lands. *United States v. Candelaria*, 271 U. S. 432 (1926). This does not mean that it created a right of occupancy either in the Walapai Tribe or in any other tribe, if such right was not already in existence, or even that it recognized the actual existence of such a right in the Walapai Tribe. It does mean that if the Walapai Tribe had a right of occupancy at the time the statute was enacted, that right was preserved and safeguarded until extinguished by the United States in conformity with the provisions of the act. *Buttz v. Northern Pacific Railroad*, 119 U. S. 55 (1886).

The protection afforded by the 1866 act to existing Indian rights of use and occupancy based on immemorial possession was not something new in American law. This Court has consistently held that in the absence of express language to the contrary, a Federal grant of public lands does not constitute an extinguishment of Indian occupancy

ARGUMENT

POINT I

WITH RESPECT TO LANDS WHICH THE WALAPAI TRIBE OF JULY 27, 1866 HAD CONTINUOUSLY OCCUPIED FROM TIME IMMEMORIAL, THE TRIBE ENJOYED A RIGHT OF OCCUPANCY, SAFEGUARDED BY THE RAILROAD GRANT ACT OF THAT DATE.

1. The act of 1866 safeguarded whatever rights of occupancy the Walapai Tribe enjoyed at the time of its enactment.

Section 2 of the act of July 27, 1866 (14 Stat. 292) (Appendix I, G) provides:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

By the foregoing provision, Congress necessarily indicated (a) that the existence of Indian title in certain lands was not to exclude those lands from the "donation to the road named in the act"; and (b) that as to such lands Indian title was to continue until extinguished, the United States assuming a duty to extinguish such Indian title "as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession."

The term "Indian title" had a well understood meaning. It connoted the Indian possessory right based on aboriginal occupancy, whether or not that

lands quitclaimed within the reservation is to stand, it is doubtful whether, under existing law, the United States may legally continue to treat the quitclaimed area as a part of the Walapai reservation. (See act of May 25, 1918, 40 Stat. 561, 570, 25 U. S. C. 211.) The foregoing considerations were advanced by petitioner in answer to the argument of the respondent, opposing the granting of certiorari, that the execution of the quitclaim has eliminated the first cause of action or rendered it unimportant.

SPECIFICATION OF ERRORS TO BE URGED

1. That the courts below erred in holding that the Walapai Tribe on July 27, 1869, did not enjoy a right of occupancy, safeguarded by the Railroad Grant Act of that date, with respect to lands which the tribe had continuously occupied from time immemorial.

2. That the courts below erred in holding that any rights of the Walapai Tribe that may have existed on July 27, 1869, have been extinguished since that date by the United States or abandoned by the Walapai Tribe.

3. That the courts below erred in depriving the United States and the Walapai Tribe of the right to a trial of the facts to determine whether and to what extent the Walapai Tribe of Indians have continuously occupied and possessed the lands described in the complaint.

dated January 23, 1941, whereby the respondent quitclaimed to the United States all the lands to which the first cause of action relates. These are lands inside the Walapai Reservation, in contrast to those outside the reservation which are covered by the second cause of action. Respondent executed this quitclaim in order to obtain certain benefits under the Transportation Act of September 18, 1940 (54 Stat. 879), which were conditioned upon the release of its claim to unpatented lands of any kind. The lands claimed by the railroad within the reservation had never been patented to it and the quitclaim was limited to those unpatented lands.

This quitclaim has no relevance to the merits of the pending action. It obviously has nothing whatever to do with the lands covered by the second cause of action. Nor can it have any bearing upon the right of the Indians to an accounting under the first cause of action. "for all rents, issues, and profits derived from the leasing, renting or use of lands subject to such right of occupancy by such Hualapai Tribe." (R. 20). Moreover, the quitclaim of reservation lands to the United States did not give the Government or the Walapai Tribe the primary relief sought in the case at bar, i. e., an adjudication that the tribe has "a right of occupancy and use" in those lands. If the decision of the courts below that the Walapai Indians have no right of occupancy in the

had concluded that the facts alleged in the complaint did not make out a cause of action.

The Circuit Court of Appeals affirmed the dismissal of the complaint without entering up the essential findings in the District Court's order. Without referring expressly to the conflicting positions of counsel, the Circuit Court purported to take judicial notice of the falsity of allegations in the complaint asserting continuous Indian possession of the lands in controversy. The appellate court also assumed as a fact, contrary to the allegations in the complaint (R. 4, 8, 9, 15, 16), that possession of the lands claimed in this suit had been abandoned and that the tribe had removed, or been removed from, the area now claimed (R. 211).

In petitioning for certiorari, therefore, and in the present brief, the Government has been compelled to consider both possible interpretations of the action taken in the courts below: (a) that the complaint was dismissed on the ground that the facts alleged therein failed to state a cause of action, and (b) that the complaint was dismissed on the ground that essential allegations of fact contained therein were found by the court to be false. Points 1 and 2 of the argument in this brief will be addressed to the first alternative, and Point 3 to the second.

Subsequent to the filing of the petition for certiorari, the Government received an indication

On this state of the record, confusion inevitably resulted, on the appeal taken from the order dismissing the complaint, as to just what the District Court had decided or purported to decide. The railroad sought to treat the decision as one disposing of the case on the merits and to rely on the "findings" as if they were findings of fact made by an equity court on a trial of the facts after issue reached. The Government, on the other hand, insisted that the court could not properly and had not actually decided any questions of fact and that the "Supplemental Order and Opinion" merely explained the reasoning on which the court

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definable territory and no place or places for any great length of time." (R. 30, 192.)

and various evidentiary supporting materials indicating generally that certain explorers reported these Indians "subsisting on wild foods and dressing in skins" and that various travelers reported seeing Indians other than *Walapai* within the area claimed in this suit (R. 30–33, 192). A similar instance as to mixed fact and law is supplied by the court's "finding" concerning the extinguishment of the Indian possessory right, if any, to the lands in controversy (R. 67–73, 194–195). An important instance as to a pure question of law is supplied by the court's "finding" as to Mexican and Spanish law, based for the most part on the arguments later unsuccessfully pressed on this Court on behalf of other parties in another suit (*Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315 (1927)) (R. 145–189)).

The respondent's memorandum and other materials which have been injected into the present record also deal in considerable measure with issues never properly involved in the case at bar (e. g., rights of the Indians as against the United States) and with questions which have been eliminated by the election of the government hereinabove referred to.

"Memorandum of Points and Authorities" and brief filed in support of the motion. These were, in express terms, made a part of the "Supplemental Order" and, on respondent's designation (R. 203), have been incorporated into the record.

The materials thus injected into the case consist of a heterogeneous collection of legal arguments by the railroad's attorneys in this case and by attorneys for other parties in another case, factual assertions, hearsay statements, crude privately prepared maps, official and nonofficial reports, and unassorted miscellaneous papers and documents. Here and there, these materials bear on pure questions of fact and (and in varying degrees to dispute the truth of allegations of fact contained in the complaint; to a considerable extent they deal in a similar way with mixed questions of law and fact; and in large measure they are mere arguments on questions of law.[4]

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[4] The materials included in the record consist of (a) the entire 38-page "Memorandum" (R. 25–63). (b) its 10 supplementary appendices (R. 83–132). (c) fragmentary excerpts (R. 133–145) from respondent's 133-page printed brief in support of the motion to dismiss, (d) much longer excerpts from a brief in another case between other parties (R. 145–159), and (e) excerpts from the "Appendix" to this latter brief (R. 159–183).

[5] Thus, the first "finding" quoted above was based on, and incorporated by reference, the railroad's own assertion that—

"The *Wabash* were disunited bands of nonagricultural, nomadic savages, who occupied exclusively to

land in controversy under the laws of Spain and Mexico" (R. 192).

(b) "For plaintiff to prevail, it must show some act of the legislative or executive departments of the government creating some right in the Walapai Indians superior to the rights of defendant under the Granting Act" (R. 192).

(c) This has not been shown. For courts, "the sources and authorities cited by defendant * * * show beyond possibility of challenge * * * that it was not the policy of the United States to accord these Indians any possessory or other rights because of any alleged occupancy claim" (R. 192–193).

(d) If the Indians had had any rights, "there is no doubt that they were extinguished by acts of Congress and lawful acts of the executive * * *" (R. 191).

(e) "The controlling elements of this case namely, the laws of Spain and Mexico, the Legislation of Congress, and the course of administration, are matters of judicial knowledge. * * * No evidence upon the issues plaintiff desires to prove would enable plaintiff to escape the controlling effect of public law and public administration, which the Court judicially knows, which cannot be controverted by evidence and which requires dismissal of the case" (R. 195–196).

In support of these and related "findings" and to indicate the source of its judicial knowledge, the court referred to various portions of the

the manner specifically provided for in the granting act. While the Government relied on both alternatives in the District Court, it made a definite election in the Circuit Court of Appeals in favor of the latter and will take the same position here. There also was a third alternative basis of action on which the Government relied in the District Court. This related exclusively to lands inside the reservation and was based on the special allegations, in paragraph 13 of the complaint (R. 9), setting forth a recognition of title by adverse possession. This was not pressed in the Circuit Court of Appeals and will not be argued on the merits here.

The railroad moved to dismiss the complaint (R. 24–26), explaining in a supporting "Memorandum of Points and Authorities" that—

> The basic theory of this motion is that, to the knowledge of the Court, the complaint states no cause of action. [R. 28.]

The District Court granted the motion (R. 190) and later filed a "Supplemental Order and Opinion" (R. 191–196) to reveal the "conclusions" upon which the order dismissing the complaint had been based. The supplemental order contained a series of "findings," the more important of which are:

> (a) "The Walapai were of the savage tribes referred to in the Treaty of Guadalupe Hidalgo" and "had no rights to the

versy. The relief prayed for included, among other things, a request for an accounting for rents, issues, and profits and a request "that any and all right, title, or interest claimed or asserted by" the railroad "be adjudged and decreed to be null and void, or, if found valid, be adjudged and decreed to be subject to the continued right of occupancy and use by" the *Walapai* Tribe (R. 20).

This request in the alternative reflected the two alternative theories or grounds on which the Government originally sought to sustain its right to maintain this suit and which applied equally to all the lands in controversy. These theories were predicated on alternative interpretations of the 1866 granting act and of its effect on lands that were subject, at the time of the grant, to a valid Indian claim of immemorial use and occupancy. Under one interpretation, the Indian right of use and occupancy was relied on as having prevented the lands in question from being public lands to which "the United States have full title * * * free from preemption or other claims or rights" and hence as having excluded the lands from the grant altogether. Under the other interpretation, the special provisions in section 2 of the granting act, specifying how "Indian title * * * acquired in the donation to the road named in the act" is to be extinguished, are taken to indicate that title did pass from the United States to the railroad under the grant, but that it did so subject to the rights of the Indians until extinguished in

their ancestral home long before as well as ever since the act of July 27, 1866 (R. 7, 8, 9, 14, 15, 16). One segment of this line is inside the boundaries of a reservation established for the Walapai Indians by the duly constituted authorities of the United States Army on July 8, 1881, and continued by Executive Order of January 4, 1883 (1 Kappler 804) (R. 4–7). Another part of the railroad right of-way passes through Walapai ancestral lands which lie outside this reservation (R. 10–16). No patents have ever been issued to the railroad as to any of the lands inside the reservation which are claimed by it under the 1866 act. As to lands outside the reservation, a series of similar United States patents were issued to the railroad which cover in the aggregate all the alternate, odd-numbered sections of land on both sides of the railroad line within the limits specified in the 1866 act (R. 18, 19, 29).

The present suit has been brought by the United States, as guardian of the Indians, to establish judicially that the railroad's rights under the grant are subject to the Indians' right of occupancy in their ancestral lands both inside and outside their present reservation. The bill of complaint consists of one group of allegations relating to lands inside the reservation (R. 2–10), of another group, designated as a "Second Cause of Action" (R. 10–19), relating to lands outside the reservation, followed by a common prayer for relief equally applicable for the most part to all the lands in contro-

is invoked under section 240 (a) of the Judicial Code, as amended, 28 U. S. C. sec. 347 (a).

STATEMENT

By act of July 27, 1866 (14 Stat. 292), Congress granted to respondent's predecessor in title a right-of-way over the "public domain" for the construction of a railroad and telegraph line (sec. 2, 14 Stat. 294) from Springfield, Missouri, to the Pacific Coast (sec. 1). The act included in addition a grant of the odd-numbered sections of public land within specified limits on each side of the railroad

> * * * whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights. * * * [Sec. 3.]

The act provided:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act. [Sec. 2.]

On March 12, 1872, the railroad definitely located its line along a route passing in northwestern Arizona across lands with respect to which, it is alleged in the bill of complaint, the Indians of the Walapai Tribe have asserted an exclusive right of occupancy and which they actually have occupied as part of

United States in its own right and as guardian of the Indians of the *Walapai*[1] Tribe in Arizona to enjoin respondent from interfering with the possession and occupancy by the Indians of certain lands in northwestern Arizona (R. 2, 19–21, 29). The respondent, a corporation organized under the act of March 3, 1897 (29 Stat. 622), and doing business in the State of Arizona (R. 3), claims full and unrestricted title to the lands in question under the grant to its predecessor, the Atlantic and Pacific Railroad, provided for in the act of July 27, 1866 (14 Stat. 292) (R. 7, 15, 29). Jurisdiction of the District Court, invoked under section 24 of the Judicial Code, as amended, 28 U. S. C. sec. 41 (1), has not been challenged.

The suit did not come to issue or trial in the District Court, but was dismissed, on respondent's motion, on the ground that, to the knowledge of the court, the bill of complaint failed to state a cause of action (R. 190, 196). On an appeal (R. 196), taken under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a), the United States Circuit Court of Appeals for the Ninth Circuit affirmed the order of dismissal. A petition for a writ of certiorari, filed in this Court by the United States, was granted on March 10, 1941 (R. 217). Jurisdiction now to review the final decree of affirmance entered in the Circuit Court of Appeals

[1] This spelling, used by the courts below, will be adopted throughout this brief.

ence, nature, and incidents of this governmental policy of protecting aboriginal occupancy have already been established by, and are embodied in, a long series of Federal statutes and decisions of this Court.

A review of these statutes and decisions will show that continuous occupancy of a defined area from time immemorial creates a legally enforceable possessory right, valid against all parties other than the United States itself, which alone has power to extinguish this possessory right. Legislative definition of this possessory right may be traced from the first act of the United States on this subject in 1783 to current provisions of the United States Code. Judicial recognition of this right has been consistent from the classic opinion written by Chief Justice Marshall in *Johnson* v. *McIntosh,* 8 Wheat. 543 (1823), to the most recent formulation of the principle in *United States* v. *Shoshone Tribe,* 304 U. S. 111 (1938).

This uniform course of congressional legislation and judicial decision makes it clear that the right of an Indian tribe in lands continuously occupied from time immemorial to protection against all claimants other than the United States is not a right which depends upon the geographical location of the tribe or upon the political history under prior sovereignties of the lands so occupied. That such aboriginal occupancy is entitled to judicial protection against all parties other than the United States has now become an

established rule of Federal law. The legal right thus conferred upon an Indian tribe does not require amplification by proof of similar right under any prior sovereignty nor by proof that the right which the law allows has always in fact been respected by administrative officials or third parties.

The rule recognizing possessory rights by reason of aboriginal occupancy is a general one applicable to any Indian tribe situated anywhere within the United States. The rule was established on grounds equally applicable to all tribes and to all parts of the United States. The rule has never been limited by this Court to the particular tribes or areas that happened to be involved in particular cases.

To demonstrate the truth of the foregoing assertion requires an analysis of the decisions recognizing the right in question. The rule was first enunciated by Chief Justice Marshall in *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823). The following brief excerpts from his opinion set forth in clear terms the legal status of Indian possessory rights based upon aboriginal occupancy:

> * * * The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same

object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

* * * * *

* * * the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, *with a legal as well as just claim to retain possession of it, and to use it according to their own discretion;* but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in posses-

> sion of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. (At pp. 572–574.) [Italics supplied.]

This Court has had frequent occasion to reconsider this rule and on each occasion has reaffirmed it. In the famous case of *Worcester* v. *Georgia*, 6 Pet. 515 (1832), this Court, *per* Marshall, *C. J.*, after pointing out that "the great maritime powers of Europe" had agreed upon the principle set forth in the *McIntosh* case, went on to expound that principle in the following terms:

> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell (at p. 544).

Again in *Mitchel* v. *United States*, 9 Pet. 711 (1835), this Court declared:

> * * * One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.
>
> Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.
>
> * * * * *
>
> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to it [ex]clusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. * * * Such, too, was the view taken by this court of Indian rights in the case of *Johnson* v.

M'Intosh, 8 Wheat. 571, 604, which has received universal assent.

> The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee-simple of the whites. (5 Pet. 48.) (At pp. 745–747.)

In the leading case of *Choteau* v. *Molony,* 16 How. 203 (1853), this Court held that under the Spanish law applicable in the Louisiana Territory the possessory rights of the Fox Tribe of Indians in lands aboriginally occupied by them were such that any grants made by the Spanish Governor would be "subject to the rights of Indian occupancy. They would not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish Governor to authorize anyone to interfere with it" (p. 239).

The same rule with respect to aboriginal possessory rights was reaffirmed by this Court in *Holden* v. *Joy,* 17 Wall. (84 U. S.) 211 (1872):

> Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption

> right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs. (At p. 244.)

Of all the cases in which this Court has had occasion to consider the character of Indian occupancy rights, the case closest on its facts to the case at bar is *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55 (1886). There this Court ruled that where Congress granted public lands within a certain area to a railroad and some of the lands within this area were occupied by Indian tribes, the railroad took a title to these lands which was *subject to the right of Indian occupancy.*[5] The Court declared:

> * * * At the time the act of July 2d, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the govern-

[5] The result of this rule, in the case cited, was that when the United States did secure a relinquishment of title from these Indians, perfect title immediately vested in the railroad.

> ment. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. * * * (At p. 66.)

The parallels between the *Buttz* case and the case at bar are many and persuasive. The language of the two grants is substantially identical.[6] In both cases the lands in question were former Spanish territory, in the one case acquired through the intermediate possession of France, in the other through the intermediate possession of

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[6]

Buttz Case	*Case at Bar*
Act of July 2, 1864 (13 Stat. 365)	*Act of July 27, 1866 (14 Stat. 292)*
The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill. (Sec. 2.)	The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act. (Sec. 2.)

The only material difference between the phrasing of the two acts is that the act involved in the case at bar accorded the Indians the added protection embodied in the phrase "and only by their voluntary cession" as a qualification upon the undertaking of the United States to extinguish Indian title.

Mexico. The rule applied in the *Buttz* case to the protection of Indian aboriginal occupancy was a part, as the court below recognized (R. 206), of "the policy of maintaining just and peaceable relations with the Indians." Considerations of justice were no less applicable to the Walapai Tribe than to any other. Equally pertinent was the necessity or expediency of avoiding war, which, as judicial history records (*Luke* v. *United States*, 35 Ct. Cl. 15 (1899)), the Walapai Tribe was as capable, legally and physically, of waging as any other tribe. Any distinction between the *Buttz* case and the case at bar, therefore, would be irrelevant to the reasons for the rule in the former case and irrelevant to the essential facts of the latter case.

Another case paralleling the case at bar almost as closely as does the *Buttz* case is *Cramer* v. *United States*, 261 U. S. 219 (1923).

In that case, Congress had granted public lands to a railroad, and some of the lands within the area described in the grant were occupied by Indians, whose occupancy had never received affirmative governmental confirmation or recognition. This Court held that the lands so occupied were excluded from the railroad grant, and the United States, suing on behalf of the Indians, was held entitled to a decree canceling patents already issued to the railroad, with respect to the lands occupied by the Indians.

The railroad contended, in the *Cramer* case, that the rule safeguarding lands in aboriginal occupancy from the operation of a grant of public lands was not applicable to the case of individual Indians occupying rancherias. That contention was rejected by this Court. Now another railroad is presenting the opposite argument, that protection is given *only* to individual holdings and not to occupancy by tribes. This attempted distinction is without merit. This Court in the *Cramer* case declared:

> *Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States; Beecher* v. *Wetherby,* 95 U. S. 517, 525; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 385. *It is true that this policy has had in view the original nomadic tribal occupancy,* but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well-understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. (At p. 227.) [Italics ours.]

The rule which this Court thus affirmed in the *Cramer* case was one which had its origin in cases

involving tribal occupancy and was *extended* to cases of individual occupancy. It has never been *restricted* to the latter situation.[7]

In *United States* v. *Shoshone Tribe,* 304 U. S. 111 (1938), the most recent decision of this Court on the character of Indian occupancy rights, the rule with respect to aboriginal possessory rights was reaffirmed in the following terms:

> Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 48. *Worcester* v. *Georgia, supra,* 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed

[7] The difference between the decisions in the *Buttz* and the *Cramer* cases is that in the former the railroad was held to have a good legal title subject to the Indian right of occupancy, while in the latter case, this court held that the Indians' occupancy right should be protected by canceling, *pro tanto*, the patent to the railroad. The reason for this difference is that in the *Buttz* case the Railroad Grant Act expressly provided for the donation of lands subject to an Indian right of occupancy which the United States undertook to extinguish, while in the *Cramer* case no such provision is found in the governing act. The legislation in the case at bar is, as noted, similar to that in the *Buttz* case. Therefore the petitioner has abandoned its attempt to secure cancelation of the patent to the respondent railroad and asks only that the railroad's title be declared subject to the occupancy right of the Walapai Tribe.

> possessors of the soil from time immemorial. (At p. 117.)

In other words, the existence of the treaty was not necessary to the existence of "the tribe's right of occupancy" in lands possessed "from time immemorial."

The foregoing eight leading cases[8] all purport to lay down a general rule, applicable throughout the territory of the United States to all the Indian tribes residing therein. This rule was not based upon peculiarities in the relations of the Federal Government to the various tribes respectively affected by these eight cases. In no case was prior affirmative recognition by the United States of possessory right held essential to establish the validity of that right. Indeed, in the *Cramer* case, this Court took special pains to point out that such prior recognition is not essential to the establishment of an Indian right of occupancy.

> The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy. (At p. 229.)

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[8] Others to the same effect may be cited without further discussion. *Wilcox* v. *Jackson*, 13 Pet. 498 (1839); *Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S. 733 (1875); *Beecher* v. *Wetherby*, 95 U. S. 517 (1877); *Spalding* v. *Chandler*, 160 U. S. 394 (1896); *Minnesota* v. *Hitchcock*, 185 U. S. 373 (1902). And see authorities collected and discussed in Cohen, Handbook of Federal Indian Law (1941), 306–309.

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In none of the cases decided by this Court was recognition of Indian possessory rights by a prior sovereign held essential to the validity of such rights under the law of the United States.[9] In the *Cramer* case, the prior sovereigns were Spain and Mexico. In both the *Choteau* and *Buttz* cases, the prior sovereigns were Spain and France. In the *Mitchel* case the prior sovereigns were Great Britain and Spain. In *Worcester* v. *Georgia* and *Holden* v. *Joy* the prior sovereigns were Great Britain and Georgia. In the *McIntosh* case the prior sovereign was Great Britain. In the *Shoshone* case part of the land involved was derived from Spain and Mexico, another part from Spain and France, and a third part had not been subject to any prior

[9] There are two decisions of inferior courts which contain dicta pertinent to this issue. In *Hayt* v. *United States*, 38 Ct. Cl. 455 (1903), the opinion of the court contains some language which may be construed as asserting that Indian tribes had no occupancy rights within the Mexican Cession area, although a more reasonable construction of the court's language is that it asserts lack of such occupancy rights *in uninhabited areas*. The actual decision in the case is that the mention of an area in a treaty relinquishment did not prove that the area was subject to "the exclusive right of occupancy" of the relinquishing tribe so as to render any third party found in the area a trespasser, unable, as such, to recover for depredations committed upon his property. The more recent case of *United States* v. *Walker River Irr. Dist.*, 104 F. (2d) 334 (C. C. A. 9, 1939) rejected the claim that Indians of the Mexican Cession area were not entitled to the same water rights accorded to Indians elsewhere in the United States and commented, "They are no less wards of the nation than are the tribes living elsewhere." (At p. 337.)

European sovereignty. This Court did not consider that the diversified prior political history of the lands involved in the *Shoshone* case had any effect whatsoever upon the character of aboriginal occupancy which the tribe enjoyed under the law of the United States. In all these eight cases the right of occupancy considered was held to be essentially a right existing under the law of the United States, applicable anywhere within the territory of the United States, and not dependent upon the attitude of prior sovereignties.

In view of the generality[10] of the rule that actual possession from time immemorial gives rise to a right of occupancy valid against all parties other than the United States until terminated by the United States, the attempt of the courts below (R. 206–210) to distinguish away the *Buttz* case on the ground that it arose in the Louisiana Purchase area, while the case at bar arises in the Mexican Cession area, is wholly without justification in law or in fact. In so far as the purported distinction is derived from alleged peculiarities of Spanish law the distinction is entirely beside the point, for both territories were

[10] In the *McIntosh*, *Worcester*, and *Choteau* cases this Court pointed out that the recognition of aboriginal rights under United States law paralleled the recognition of such rights under the laws of Spain, France, and Great Britain and, as Chief Justice Marshall said, the principle was one "acknowledged by all Europeans" and part of "the common law of European sovereigns respecting America." *Worcester* v. *Georgia*, 6 Pet. 544, 545.

formerly under Spanish sovereignty, and in the case of the Louisiana Purchase area, only 20 days intervened between the occupancy of Spain and that of the United States (Binger Hermann, *The Louisiana Purchase* (1900) 34). The short-lived French sovereignty meant a difference only in the nationality of the officials responsible for Indian supervision, as stated in the *Chotcau* case (at p. 238), for the laws recognizing and protecting Indian occupancy were similar to those of Spain. Likewise, it has been shown that the policy objectives of justice and peace which underlay the rule of the *Buttz* case, were equally applicable to the case at bar. There is thus no rational ground whatever for holding that a different rule of aboriginal occupancy applies to the Mexican Cession area from that applicable to the Louisiana Purchase area and other parts of the United States.

C. This Court has consistently rejected repeated attempts to exclude Indians of the Mexican Cession area from the benefit of rules generally applicable outside that area for the protection of Indian rights.

The present is not the first attempt which has been made to deprive Indians in the Mexican Cession area of the benefit of general rules laid down by this Court for the protection of Indian rights. Similar attempts have been made on several prior occasions and on each occasion the at-

tempt has been frustrated by the decision of this Court.

The first such attempt sought to deprive the Pueblo Indians of New Mexico of the protection granted by the Indian intercourse laws which prohibit trespass upon, or improper negotiation for, Indian lands. This Court in *United States* v. *Joseph*, 94 U. S. 614 (1876), in line with decisions of the territorial courts of New Mexico,[11] held that the Pueblo Indians were not entitled to the protection of the Indian trade and intercourse laws, on the ground that Spanish and Mexican law had endowed these Indians with a peculiar status and that being "civilized" they were not "Indians" within the meaning of Federal statutes. This decision—the only one in which this Court, on the basis of alleged peculiarities of Mexican and Spanish law, has ever denied to an Indian group of the Mexican Cession area the protection elsewhere accorded to Indians of the United States—was subsequently discredited and finally overruled. In *United States* v. *Chavez*, 290 U. S. 357 (1933), this Court, *per* Vandevanter, *J.*, re-

[11] *United States* v. *Lucero*, 1 N. Mex. 422 (1869); *United States* v. *Santisteran*, 1 N. Mex. 583 (1876); *United States* v. *Varela, Koslowski, and Joseph*, 1 N. Mex. 593 (1874), *aff'd* 94 U. S. 614; *Pueblo of Nambe* v. *Romero*, 10 N. Mex. 58 (1900); *Territory of New Mexico* v. *Delinquent Tax List*, 12 N. Mex. 139 (1904); *United States* v. *Mares*, 14 N. Mex. 1 (1907).

ferring to *United States* v. *Sandoval,* 231 U. S. 28 (1913), commented:

> * * * We also there disapproved and declined to follow the decision in the early case of *United States* v. *Joseph,* 94 U. S. 614, relating to these Indians, because it was based upon reported data which in the meantime had been found to be at variance with recognized sources of information and with the long continued action of the legislative and executive departments. (At p. 363.)

The *Chavez* case and the *Candelaria* case[12] held, in opposition to the view of the *Joseph* case, that the Indian trade and intercourse laws applied to "civilized" Indians who had been citizens of Mexico, as well as to other Indians.

The second attempt to exclude Indians of the Mexican Cession area from the scope of general rules for the protection of Indians was made in the case of *United States* v. *Kagama,* 118 U. S. 375 (1886), involving the power of Congress to control crimes between Indians on the Hoopa Valley Reservation in the State of California. This Court, in upholding the constitutionality of this statute, rendered an opinion to which constant reference has since been made in discussions of Indian law. The following brief excerpts are pertinent to the case at bar:

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[12] 271 U. S. 432 (1926).

> The Indian Reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadaloupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that Treaty to the United States. (At p. 381.)
>
> Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. * * * (At p. 381.)
>
> * * * Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. (At pp. 383–384.)

Again, the attempt was made in *Cramer* v. *United States*, 261 U. S. 219 (1923), to persuade this Court that the rule recognizing aboriginal occupancy laid down in the *Buttz* case ought not

to be applied to certain California Indians residing within the area of the Mexican Cession. The argument, as already noted (pp. 24–25, *supra*), was rejected.

In *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110 (1919), where a community of Papago Indians in Arizona sought to enjoin the Secretary of the Interior from disposing of lands aboriginally occupied by them, this Court held that the Indians concerned had the right to sue, and ordered a trial on the merits, rejecting the argument that because these Indians under Spanish and Mexican law had received no written documents of title they did not constitute "Pueblos" and had no capacity to bring suit to defend their land claims.

In *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315 (1927), after the trial court had dismissed the suit of the Indians on the merits, this Court reversed that decision and directed that the dismissal of the suit, which was justified because the attorneys bringing the suit were not properly authorized, should be "without prejudice to the bringing of any other suit hereafter by and with the authority of the alleged Pueblo of Santa Rosa." (At p. 321.)

Even more important than the decision of this Court upholding the substantive rights of these Papago Indians of the Mexican Cession area, was the decision on the procedural aspect of the second *Santa Rosa* case. In holding that the contract

of the Indians with the attorneys bringing the suit was unlawful, this Court held that the unproved claim of these Papago Indians to lands aboriginally occupied was within the scope of the law requiring departmental approval for contracts by Indian tribes "relative to their lands" (R. S. § 2103), and also came within the protection of that provision of the Indian intercourse laws (R. S. § 2116) which prohibits conveyances not made by treaty.[13] This Court went on to declare: "These sections apply here whether the Indians concerned are to be classified as nomadic or Pueblo Indians." (At p. 320.) If aboriginal possession within the Mexican Cession area is thus protected by the provisions of the Indian intercourse laws against alienation and trespass, it has just as high a character of legal recognition as is enjoyed by aboriginal occupancy in any other area of the United States and just as high a character of legal recognition as is required for purposes of this suit.

In each of the foregoing cases this Court rejected the attempt to deprive Mexican Cession Indians or particular classes of such Indians of the protection generally accorded to Indians throughout the United States.

So, in the case at bar, the distinction, relied on by the court below, between the Walapai Indians and the tribes considered in the *Buttz* and similar

[13] See pp. 78, 79, *infra*.

cases is, petitioner submits, artificial and irrelevant to the issues in this case. It follows that the Walapai Indians are entitled to the protection which the Federal law, as interpreted by this Court, has accorded to Indians throughout the United States.

D. Federal legislation applicable to the Walapai Tribe as well as to other tribes protects the Indian right of occupancy based on aboriginal possession.

An unbroken course of legislation, dating from 1783, has conferred upon the historical fact of aboriginal occupancy the character of a Federal legal right or privilege, by affording legal protection to such occupany against various forms of trespass by parties other than the United States. The first enactment of the United States upon this subject antedates our Constitution. In 1783 the Congress of the Confederation prohibited all persons from making settlement on lands "inhabited or claimed by Indians" (8 Journals of Cong. (1783) (1800 ed.) 274). Again, in the Ordinance for the Northwest Territory the Congress of the Confederation provided that the land and property of the Indians

> shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress * * * (1 Stat. 50, 52).

The first session of Congress to meet under the Constitution enacted the first Indian Trade and Intercourse Act, approved by President Washington on July 22, 1790 (1 Stat. 137). The protections against trespass upon Indian lands contained in this act, which was a temporary act, were substantially reenacted and amplified in the Indian Trade and Intercourse Acts of March 1, 1793 (1 Stat. 329); May 19, 1796 (1 Stat. 469); March 3, 1799 (1 Stat. 743); March 30, 1802 (2 Stat. 139) (the first permanent legislation in this field); and June 30, 1834 (4 Stat. 729) (Appendix I, A), which is in major part still in force as the backbone of present-day Federal Indian law.[14]

The Indian trade and intercourse laws dealt not only with trade, in the narrow sense, but with all intercourse between Indians and whites, and more particularly with the relation of the Indian tribes to the lands they occupied and to various types of intruders upon those lands.[15] As Chief Justice

[14] The development of these protections against trespass is traced in detail in Cohen, Handbook of Federal Indian Law (1941), 69–75, 306–307.

[15] The act of June 30, 1834 (4 Stat. 729), which is largely a reenactment of the earlier Indian trade and intercourse laws, prohibits, among other things: hunting and trapping in the Indian country (sec. 8); the driving of livestock "to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe" (sec. 9); the making of "a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe" (sec. 11); and the introduction (sec. 20) or manufacture (sec. 21) of intoxicating liquor within the Indian coun-

Marshall declared in *Worcester* v. *Georgia*, 6 Pet. 515 (1832), these laws

> manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States. (At p. 557.)

The force of the guarantees contained in the Indian trade and intercourse laws was not limited geographically but extended to every part of the territory of the United States. Within that territory they applied equally to lands contained in treaty reservations, to lands contained in other Indian reservations and to lands held by simple aboriginal occupancy. Whether or not the acquisition of the Mexican Cession area automatically brought these laws into operation, the laws were certainly extended to the Territory of New Mexico (including what is now Arizona) by section 17 of the act of September 9, 1850 (9 Stat. 446, 452), making effective within that area all laws of the United States not locally inapplicable, and by sec-

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try. The same law declared invalid every "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians * * * unless the same be made by treaty or convention entered into pursuant to the constitution" (sec. 12). The President was empowered to use troops to protect the Indian country against trespass (sec. 23).

tion 7 of the act of February 27, 1851 (9 Stat. 574, 587) (Appendix I, D), which declared the Indian trade and intercourse laws to be in force in that territory.

This extension of the Indian trade and intercourse laws to the territory in which the Walapai Tribe lived guaranteed to all the Indian tribes of that area precisely the same legal status and the same possessory rights in land aboriginally occupied that were enjoyed by tribes outside of that area. (*United States* v. *Candelaria*, 271 U. S. 432, 441–442 (1926).) On February 27, 1851, when Congress expressly declared the Indian trade and intercourse laws to apply to the Territory of New Mexico, no grants of land had been made to any of the Indians of this area either by Executive order or by Federal statute or treaty. Only two tribes of this area had entered into treaties with the United States[16] and neither treaty contains any grant of territory to the Indian tribes from the United States. Indeed, both treaties, which were essentially treaties of peace between warring nations, recognize that the Indian tribes in question already possessed territory, and made provision for a future fixing of "their territorial boundaries."

When Indian lands in Arizona and New Mexico, in 1851, were protected against trespass, these lands

[16] Treaty with Navajo Tribe, September 9, 1849 (9 Stat. 974); Treaty with Utah Indians, December 30, 1849 (9 Stat. 984).

could not possibly have been restricted to formally established reservations, which did not exist, but must have included lands held by aboriginal possession, in which Indian title had not yet been either confirmed or extinguished. From and after February 27, 1851, if not before, the Indian trade and intercourse laws accorded to aboriginal occupancy in Arizona and New Mexico the same guarantees that had been accorded to aboriginal occupancy elsewhere in the United States. These guarantees conferred or recognized a possessory right.[17] This right was not the less valid against third parties because it was subject to termination by appropriate action of the Federal Government.

The foregoing course of legislation recognized and implemented the enforcement of Indian possessory rights inside as well as outside of the Mexican Cession area.

The court below referred to several statutes enacted since 1851 as a basis for denying the existence of aboriginal occupancy rights in the Mexican Cession area. The first of these statutes is the act of July 22, 1854 (10 Stat. 308) (Appendix I, E), termed by the court below "one of the most significant pieces of legislation by Congress in this connection" (R. 207). Section 7 of this act extended to the area section 10 of the Preemption Act of September 4, 1841 (5 Stat. 453) (Appendix I, B).

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[17] See Cohen, Handbook of Federal Indian Law (1941), 306.

and thereby prohibited the initiation of preemption rights on lands in New Mexico unless the Indian title was first extinguished, thus confirming the existence of rights of occupancy in the tribes of the Mexican Cession area.[18]

This is a sufficient answer to the contention (R. 67–68, 207–208) that the 1854 act, which offered donations of land in Arizona outside of reservations to white settlers, operated as a termination of all Indian title in Arizona outside of reservations. Furthermore, the act did not of itself terminate any rights at all, but merely authorized donations by the United States; and no rights of occupancy could be terminated until the land was actually donated to settlers. The railroad was not a settler and does not claim any donation rights.

Nor can it be validly contended that the 1854 act, if it did not actually deprive the Arizona Indians of any possessory rights, was at least evidence of a Congressional belief that they had no possessory rights. It is acknowledged by all that Congress has and has always had the constitutional power to extinguish Indian title with or without Indian consent. Therefore, even a direct offer by Congress of certain Indian lands to white settlers would not establish the absence of an Indian title therein. The fallacy of the respondent's argument is appar-

[18] Accord: Act of March 3, 1853 (10 Stat. 244), relating to public lands in California, which protects from settlement "any tract of land in the occupation or possession of any Indian tribe."

ent if it is applied to any other context. Congress at one time confiscated most of the property of the Mormon Church and the constitutionality of this legislation was upheld by this Court. *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U. S. 1 (1890). This obviously did not mean that the Mormon Church never had any property rights or that other churches whose property has not been confiscated are without valid rights to the property in their possession. Similarly, the 1854 act, even if it authorized the Secretary of the Interior to donate Indian lands to white settlers, does not mean that the Indians had no property rights in the lands.

A second statute which was thought by the court below to reflect upon the occupancy rights of the Walapai Indians is the act of March 3, 1865 (13 Stat. 541, 559) (Appendix I, F). The court regarded the establishment of the Colorado River Reservation by this act as effectuating a termination of such Walapai occupancy rights outside of that reservation as may theretofore have existed (R. 208). Such an inference is wholly unwarranted. It is true that an Indian agent once claimed that he discussed with Walapai chiefs the establishment of this reservation, but on this very point the evidence on which respondent relies (R. 130–132) makes it clear that no binding agreement was ever consummated.[19] In fact, the whole gran-

[19] "* * * These Indians there assembled were willing, for a small amount of beef and flour, to have signed any

diose scheme of subjugating and irrigating 75,000 acres of irrigable land and concentrating thousands of diverse and mutually hostile Indians thereon collapsed completely when the difficulties and expenses involved in the scheme became apparent.[20] It was not until 1937 that Congress really began to appropriate the large sums necessary to irrigate this area.[21] It is now recognized as the exclusive

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treaty which it had been my pleasure to write. I simply proposed to them that for all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States, they should abandon that territory and confine themselves to the elbow in the Colorado river, not more than seventy-five thousand acres. But I did not enter into any obligation on account of the United States to furnish them with seeds and agricultural implements. I simply told them that if I was elected to represent that Territory in this Congress I would endeavor to lay their claims before the Government, which they understood to be magnanimous, and that I hoped that this Congress would have the generosity and the justice to provide for these Indians, who have been robbed of their lands and their means of subsistence, and that they may be allowed to live there where they have always made their homes." (Statement by Superintendent Poston, Congressional Globe 1320, March 2, 1865.)

A secondary reference to this proposal is contained in a statement by the Commissioner of Indian Affairs in his annual report for 1864. (W. P. 33.) This statement makes it clear that the proposal was merely a plan considered but not definitely accepted either by the Walapai Tribe or by the United States.

[20] See Appendix, pp. 13-14.

[21] Act of August 9, 1937 (50 Stat. 564, 580), $500,000; Act of May 9, 1938 (52 Stat. 291, 307), $700,000; Act of May 2, 1939 (53 Stat. 626, 633), $1,000,000; Act of May 10, 1939 (53

property of the Colorado River Indian Tribes of the Colorado River Reservation (a group that does not include any Walapai Indians) and of allottees, members of that group, and their heirs and assigns.[22]

Petitioner submits that no intent[23] and no agreement on the part of the Walapai Indians to abandon their lands and their homes can be deduced from a report of alleged Indian susceptibility to a vague and never-fulfilled campaign promise of an Indian agent running for Congress. An agreement for the surrender of lands "rich enough to pay the public debt of the United States" cannot reasonably be inferred from such a report. In *Blackfeet et al. Nations* v. *United States*, 81 Ct. Cl. 101 (1935), the court refused to derive an agreement of land cession from an unratified Indian treaty ceding lands, followed by an act of Congress and two Executive orders establishing a new reservation for the tribe in question. After referring to the failure of the act of Congress to mention the alleged agreement and to "the inherent difficulties of indulging inferences that Indian legislation resulted from the

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Stat. 685, 702), $1,500,000; Act of June 18, 1940 (54 Stat. 406, 437), $1,150,000; Act of June 28, 1941 (Public, No. 136, 77th Cong.), $560,000.

[22] Solicitor's Memorandum, Department of the Interior, September 15, 1936.

[23] On the essentials of such an intent see *New York Indians* v. *United States*, 170 U. S. 1 (1898).

preconceived validity by the Congress of an unratified treaty," the court said:

> * * * Aside from our opinion that unratified treaties, which expressly provide that they are to become effective only when ratified, are not binding, the court would hesitate to apply the doctrine of estoppel to tribal Indians, in the absence of positive proof that the tribe as such comprehended its rights and was accepting benefits from the Government with full knowledge of and in pursuance of rights created by treaties between the parties. * * * (At p. 130.)

The *Blackfeet* case at least involved an agreement that was actually carried out on both sides; in the case at bar there was neither an agreement nor a carrying out by either side of the terms upon which an agreement had been suggested: the United States did not complete the proposed irrigation project and the Walapai Indian Tribe did not move to the new reservation. If, as the court held, there was no binding agreement in the *Blackfeet* case *a fortiori* there was none in the case at bar. Finally, it is clear that as a matter of law the establishment of a reservation for certain Indians does not operate *ipso facto* to extinguish their rights in all other lands.[24]

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[24] *Blackfeet et al. Nations* v. *United States*, 81 Ct. Cl. 101, 124 (1935).

The establishment of reservations for various of the Rio Grande Pueblos has never been thought to operate as an extinguishment of their right to lands previously held. See

Thus, all of the collateral legislation prior to the act of July 27, 1866, is consistent with the view that Indian rights of occupancy existed, in the Mexican Cession area as elsewhere, until expressly terminated by affirmative action of the Federal Government. Most of this collateral legislation is inconsistent with the view that Indian rights of occupancy existed in that area only after an express grant of such rights by the Federal Government.[25] None of the collateral legislation repeals or modifies, expressly or by implication, the Indian intercourse laws which confer upon aboriginal occupancy in the Mexican Cession area the same legal protection that is due to aboriginal occupancy in other portions of the United States.

United States v. *Sandoval*, 231 U. S. 28, 39 (1913). And see the act of March 3, 1931 (46 Stat. 1509), authorizing the issuance of a patent to the Zuni Pueblo, based on rights under Spanish and Mexican law, pursuant to the act of July 22, 1854 (10 Stat. 308, 309). The lands in question, or part of them, were reserved "for the use and occupancy of the Zuni Pueblo Indians" in a series of Executive orders, of which the first is dated March 16, 1877. See Executive Orders Relating to Indian Reservations: 1855–1912 (1912), pp. 129–130. These Executive orders, Congress agreed, did not wipe out rights based on Spanish and Mexican law.

Even the Spanish law, upon which respondent relies so heavily to show absence of Indian right, expressly provided that the removal of Indians to a reservation should not operate to extinguish their possessory rights in the lands from which they removed. See Recopilacion, Law 9, Title 3, Book 6, cited at p. 47, *supra*.

[25] That such occupancy rights were not extinguished is confirmed by the act of February 23, 1865 (13 Stat. 432), authorizing the acquisition, by negotiation, of Indian possessory rights within the Territory of Utah.

E. Executive interpretation of the 1866 act and Executive action with respect to the lands of the Mexican Cession area confirm the existence of possessory rights in lands aboriginally occupied.

The uniform course of judicial decision and congressional legislation reviewed in the foregoing pages establishes rights which it was not within the power of administrative officials to abrogate even if they sought to do so. The heterogeneous collection of materials which has been injected into the record in this case (R. 29–145, 191–195) might be relevant if a need existed to resort to administrative interpretation and other extraneous aids for the resolution of statutory ambiguities. No such ambiguities have been shown in the statutes that govern this case. No attempt will therefore be made to deal in detail with this material. However, the contention of the court below that the Federal policy towards Indian occupancy rights in the Mexican Cession area was radically different from that in other parts of the country will be briefly considered. In doing so petitioner will pay special regard to three kinds of administrative material having a comparatively high value as evidence of national policy: (a) foreign treaties, (b) Indian treaties, and (c) regulations of executive departments.

The first formulation of Government policy towards the lands acquired under the treaty of Gua-

dalupe Hidalgo is found in the treaty itself (treaty of February 2, 1848, 9 Stat. 922, Appendix I, C), which guarantees protection to all Indian tribes with respect to their aboriginal homes and requires that special care shall be taken not to place the Indian occupants of the ceded area "under the necessity of seeking new homes" (Art. 11). This was a formal expression of Executive policy ratified by the Senate and constituting an international obligation toward a sister republic which had reason to fear the consequences to the inhabitants of its own territory if neighboring tribes in the area of the Cession should be torn loose from their aboriginal homes. The language of the treaty is the clearest possible expression of national policy and the subsequent legislation, which has already been traced, extending to the area of the Mexican Cession the protection granted in other parts of the United States to aboriginal occupancy was in fulfillment of the international obligation assumed by this treaty.

Again, a clear, specific, and formal recognition of Indian occupancy rights in the territory of the Mexican Cession is found in a series of Indian treaties executed with tribes of the Mexican Cession area during the two decades following the cession. Along the prospective right-of-way which might be secured by the respondent's predecessor under the act of July 27, 1866, those lands to which the United States had title were subject to the oc-

cupancy claims of various Indian tribes. Between the eastern terminal of the respondent's predecessor, in Missouri, and the Walapai country, in Arizona, aboriginal occupancy rights were asserted by seven major Indian tribes or nations. These were the Osage, Cheyenne, Arapaho, Kiowa, Comanche, Apache, Ute, and Navajo. Of these tribes the Apache, the Ute, and the Navajo claimed lands wholly or principally within former Mexican territory, and the Cheyenne, Arapaho, Kiowa, and Comanche claimed lands partly within former Mexican territory. The United States negotiated treaties with each of these seven tribes for the extinguishment of Indian title in the lands claimed.[28] Treaties with some of these tribes were already in effect when the act of July 27, 1866, was passed.

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[28] Treaty of July 1, 1852, with the Apache Nation, 10 Stat. 979; Treaty of February 18, 1861, with the Confederated Tribes of Arapaho and Cheyenne Indians of the Upper Arkansas River, 12 Stat. 1163; Treaty of October 7, 1863, with the Tabeguache Band of Utah Indians, 13 Stat. 673, 674; Treaty of September 29, 1865, with the Osage Nation, 14 Stat. 687, supplemented by section 12 of the act of July 15, 1870, 16 Stat. 335, 362; Treaty of October 14, 1865 (proclaimed on February 2, 1867), with the Cheyenne and Arrapahoe Tribes, 14 Stat. 703; Treaty of October 17, 1865, with the Apache, Cheyenne and Arrapahoe Tribes, 14 Stat. 713; Treaty of October 21, 1867, with the Kiowa, Comanche, and Apache Tribes, 15 Stat. 589; Treaty of March 2, 1868, with the Ute Indians, 15 Stat. 619, supplemented by agreement with the Ute Nation, dated September 13, 1873, ratified by the act of April 29, 1874, 18 Stat. 36, and agreement with the Ute Nation, dated March 6, 1880, ratified by the act of June 15, 1880, 21 Stat. 199; Treaty of June 1, 1868, with the Navajo Tribe, 15 Stat. 667.

Treaties with the Kiowa, Comanche, Apache, Navajo, and Ute were negotiated during the two years following the enactment of the 1866 act. Several of these treaties made specific reference to the contemplated building of railroads through country ceded or retained by the Indians, and secured the assent of the negotiating tribes to the building of railroads across reserved lands.[27]

In all the nine treaties entered into with these seven tribes there is no suggestion that the tribes which were relinquishing their rights, based on aboriginal occupancy, had nothing to relinquish because all or part of the lands covered by these treaties had been under Mexican sovereignty. One of the earliest treaties to be negotiated contains a precautionary proviso to the effect that the treaty was not to be construed as admitting in the Indians "any other or greater title or interest in the lands above excepted and reserved in said tribe or band of Indians than existed in them upon the acquisition of said territory from Mexico by the laws thereof."[28] The language of this pro-

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[27] See Article 3 of Treaty of October 7, 1863, with the Tabeguache Band of Utah Indians, 13 Stat. 673, 674; Article 11 of Treaty with the Osage Nation, 14 Stat. 687, 689; Article 14 of Treaty of March 2, 1868, with the Ute Indians, 15 Stat. 619, 622; Article 9 of Treaty of June 1, 1868, with the Navajo, 15 Stat. 667, 670.

[28] Treaty of October 7, 1863, with the Tabeguache Band of Utah Indians, 13 Stat. 673, 677.

Similar precautionary language was contained in certain treaties with various divisions of the Shoshone Nation who

viso assumed that they had some interest in these lands and sought to guard against the enlargement of that interest into a fee simple. This precautionary language does not appear in any of the other eight treaties cited.

So far, then, as the treaties of the United States set forth a national policy, they set forth a policy toward lands formerly under Mexican sovereignty no different from that applied to other lands, a policy strictly in conformity with the decisions and statutes cited in the foregoing sections of this brief.

If, as held by the courts below, the policy of protecting aboriginal occupancy that was applied outside of the Mexican Cession area was denied within that area, the regulations of the Indian Bureau ought to reveal this difference of treatment. Careful search, however, has failed to show any evidence whatever of any such cleavage. As a matter of fact, on June 15, 1865, only a year before the Railroad Grant Act, the superintendent of Indian Affairs for Arizona asked to be furnished with copies of laws affecting the Indians of Arizona. On August 28, 1865, the Com-

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occupied land a part of which came from Mexico. The Court of Claims and this Court, in holding that it constituted a recognition of the usual Indian title, made no distinction between the lands deraigned from Mexico and those obtained otherwise. *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 485 (1937); *United States* v. *Shoshone Tribe*, 304 U. S. 111, 113 (1938), aff'g 85 Ct. Cl. 331, 335.

missioner of Indian Affairs responded transmitting a copy of the general laws and regulations elsewhere applicable to the Indian Service [29] and advising the inquiring superintendent: "There are no laws especially applicable to the superintendency of Arizona." [30]

The foregoing materials indicate at least that in these various situations where the Executive branch of the Government gave formal expression to its policies with respect to occupancy rights of the tribes in the Mexican Cession area and the Walapai Tribe in particular, it dealt with those rights in the same terms that were applied to other tribes. Apart from this material a vast amount of administrative materials may be found in which Federal officials expressed general views on the validity of Indian occupancy rights or particular views, in the absence of one or both of the parties, as to the comparative rights of the Walapai Indians and the railroad. Such comments are interesting but unimportant. They may be cited on both sides of the present controversy. On behalf of the rule of uniformity which assigns to Indians in the Mexican Cession the same rights as other Indians enjoy there may be cited the statement of James Duane Doty,

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[29] Apparently the compilation submitted was one entitled "Laws, Regulations, etc., of the Indian Bureau (1850)."

[30] *Cf.* agreement set forth in Appendix, at p. 37, showing grant of permit by Walapai Tribe with administrative approval.

Superintendent for the Territory of Utah,[31] who, in a report dated September 12, 1862 (embodied in the report of the Commissioner of Indian Affairs for 1862), declared:

> Although the title was obtained by the treaty with Mexico, these Indians were then the occupants of every portion of this Territory, enjoying the same rights and privileges as the Indians east of the Mississippi river. The United States accepted of the cession, subject to all of the just rights of this third party then in the actual possession, but who was not a party to the treaty.

and the statement made by the Commissioner of Indian Affairs in his report for 1872, the year when respondent claims that its rights first attached to the lands here in suit:

> The executive and the legislative departments of the Government, however, have never recognized any distinction between the Indians living on territory ceded by Mexico and those upon territory ceded by Great Britain, France, or Spain. (At p. 82.)

On the other hand, statements by executive officers to a contrary effect may be found in an informal memorandum of the Solicitor of the Department of the Interior dated September 16,

[31] As bearing upon the weight to be given to Superintendent Doty's views, it may be noted that he had been a judge in the Territory of Wisconsin as well as Governor of that State and later served as Governor of the Territory of Utah.

1931, dealing with a part of the lands covered by the present suit, and in a letter written by Assistant Attorney General Richardson to the First Assistant Secretary of the Interior on November 12, 1931, expressing informal concurrence with the Solicitor's views but safeguarding his expression with the statement, "In conclusion, it is impossible to definitely state what the result of a court proceeding might eventually be."

If these various expressions pro and con are to be weighed against each other it should be noted that the Solicitor of the Interior Department and the Assistant Attorney General in 1931 had not had the benefit of a statement by the Walapai Tribe concerning its claims and that the supplied statement of facts furnished by the Assistant Commissioner of Indian Affairs has turned out to be erroneous in a number of essential respects.[32]

The issue before this Court is, of course, not the accuracy of any predications made by Solicitor Finney and Assistant Attorney General Richardson as to the probable outcome of this suit, but

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[32] Thus, Solicitor Finney assumed: "In fact, at the date of definite location, there were no Indians inhabiting this region of the county" (W. P. 324). And Assistant Attorney General Richardson made a similar assumption, based upon the erroneous advice of the Office of Indian Affairs that the entire Walapai Tribe was removed to the Colorado River Reservation in 1869 (W. P. 325). We now know that this was not the case, and that it was not before 1874, two years after the date of definite location of the railroad, that a minority of the tribe (and not the tribe as a whole) was removed tem-

rather the issue of whether the set of facts presented in the present complaint, a very different set of facts from that presented by the Assistant Commissioner of Indian Affairs in 1931, is sufficient to state a cause of action and to permit a proper consideration of the case upon a presentation of evidence by both sides.

The decision in *Cramer* v. *United States, supra,* where the lands in question had already been patented to the railroad and it was necessary to cancel the patents in order to protect the Indian right therein, shows that even if, in reliance upon the advice of Solicitor Finney and Assistant Attorney General Richardson, patents had been issued to the railroad for the lands within the reservation claimed by the railroad (which was never done), such an administrative decision would not now bar the relief that is here sought. Nor does the fact that patents were issued to the railroad for lands outside the reservation bar the relief now sought.

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porarily to the Colorado River Reservation. (See Appendix, pp. 45–50.) Assistant Attorney General Richardson likewise based his views on information that the Walapai Indians "did not, however, have any fixed homes, but were a wandering, warlike, hunting people that followed the herds of game" (*Ibid.*). A similar assumption as to the habits of the Walapais seems to have been made by Solicitor Finney (W. P. 324). We now know, and are prepared to prove (see Appendix, pp. 23–37), that the Walapai Indians did have fixed homes, did maintain permanent villages and rancherias, occupied a well-defined area noted on several contemporaneous maps, and were definitely not a "wandering, warlike, hunting people that followed the herds of game."

Except for the decision embodied in the present suit, asserting the superiority of the Indian claim, no considered decision has ever been made by the Executive branch of the Government as to the relative rights of the Walapai Tribe and the respondent railroad.

To accord to scattered, doubtful, and tentative expressions of opinion by administrative officials the force which has been granted to these expressions by the courts below is, petitioner submits, entirely unjustified. Even if the Government's officers actually believed that the Walapai had no right of use and occupancy in their country prior to the 1866 grant act, still the conclusion which the courts below drew does not follow. Far from administrative acts of this kind demonstrating of their own force that the Indians have no title, in many instances elsewhere when the rights of the Indians were directly brought into issue for judicial scrutiny such administrative acts have been held to be wrongful interferences with those rights. A prior, valid title of the Indians has been found to have existed notwithstanding that Presidential proclamation declared the lands part of the public domain and opened them to homestead entry;[31] or that Executive orders limited

[31] *New York Indians* v. *United States*, 170 U. S. 1, 4, 34 (1898), rev'g 30 Ct. Cl. 413 (1895), involving lands in Kansas which had earlier been set apart for the New York Indians, but which were proclaimed a part of the public domain and thrown open to settlement by Presidential proclamations of December 3 and 17, 1860.

their territory;[34] or that military reservations were established within the territory claimed by the Indians;[35] or that the Attorney General ruled in formal opinions[36] that Indians had no right in the timber on their lands;[37] or that the Secretary of the Interior[38] or Commissioner of Indian Affairs[39] ruled that the Indians did not possess

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[34] *Blackfeet et al. Nations* v. *United States*, 81 Ct. Cl. 101, 112, 130 (1935), wherein the treaty of 1855, which was held not to be affected by unratified treaties of 1865 and 1868, was disregarded by an Executive order of July 5, 1873 (1 Kappler 855), an act of Congress approved April 15, 1874 (18 Stat. 28), an Executive order of August 19, 1874 (1 Kappler 856), an Executive order of April 13, 1875 (1 Kappler 856), and an Executive order of July 13, 1880 (1 Kappler 856). Part of the lands ceded to the Indians by the treaty of 1855 were thrown open to settlement by act of Congress of April 15, 1874 (18 Stat. 28), and Executive order of August 19, 1874 (1 Kappler 856).

[35] *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, 328, 335 (1930); *Shoshone Indians* v. *United States*, 82 Ct. Cl. 23, 49 (1935). *Cf. Assiniboine Indian Tribe* v. *United States*, 77 Ct. Cl. 347, 354, 371 (1933), *app. dism.* 292 U. S. 606.

[36] 19 Op. Atty. Gen. 194 (1888); 19 Op. Atty. Gen. 710 (1890).

[37] It was held that the Indians had a right to the timber on tribal land, in *United States* v. *Shoshone Tribe*, 304 U. S. 111, 118 (1938), and *United States* v. *Klamath Indians*, 304 U. S. 119, 123 (1938). Thereupon Congress enacted a law to restore to the Chippewa Tribe timber sale proceeds which had been deposited in the United States Treasury pursuant to the opinions of the Attorney General above cited. Act of June 15, 1938 (52 Stat. 688).

[38] *New York Indians* v. *United States*, 170 U. S. 1, 31 (1898).

[39] The ruling of the Commissioner of Indian Affairs that certain tribes had no rights in their ancestral domain was proved wrong in *Fort Berthold Indians* v. *United States*, 71

the rights they claimed; or that Indians were placed on the reservation of other Indians by virtue of the use of the military force of the United States;[40] or that the lands of the Indians were patented to outsiders;[41] or that funds of the Indians derived from sale of their lands were deposited to the credit of the United States.[42]

Accordingly, although petitioner believes that a judicious analysis of administrative materials bearing upon the occupancy rights of the Walapai

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Ct. Cl. 308, 336 (1930). Likewise, in *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 494 (1937), rev'g 82 Ct. Cl. 23 (1935), although the Commissioner of Indian Affairs had held that Indians placed upon the reservation of another tribe had equal rights in the reservation with that other tribe, the court found that the original tribe had exclusive rights which it had not voluntarily yielded.

[40] In the Shoshone case, *supra*, note 39, the Arapaho Indians were moved into the reservation of the Shoshones under military escort, notwithstanding which the Shoshones were found to have been entitled to exclusive possession of the reservation.

[41] In the following cases, among others, the lands of the Indians were treated by the administrative offices of the Government as lands of the United States, through patenting of the lands to outsiders; in each instance, this administrative action was found to have been in derogation of the rights of the Indians: *Mille Lac Chippewas* v. *United States*, 229 U. S. 498, 506 (1913), rev'g 46 Ct. Cl. 424 (1911), and 47 Ct. Cl. 315 (1912); *New York Indians* v. *United States*, 170 U. S. 1, 4, 34 (1898), rev'g 30 Ct. Cl. 413 (1895); *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, 326, 337 (1930). *Cf. Assiniboine Indian Tribe* v. *United States*, 77 Ct. Cl. 347, 356, 371 (1933), app. dism. 292 U. S. 606; *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935), rev'g 77 Ct. Cl. 159 (1933).

[42] *New York Indians* v. *United States*, 170 U. S. 1, 4, 34 (1898), rev'g 30 Ct. Cl. 413 (1895).

Tribe and other tribes in Arizona and New Mexico will show a fairly consistent recognition of these rights in principle and doubts only as to the factual issue of their exact territorial extent, petitioner prefers to rest its argument on the broader ground that the rights of the Walapai Tribe, as of other tribes, are legal rights recognized by statute and confirmed by the consistent course of decisions of this Court, and that it has never been within the power of administrative officials to repeal these statutes, to reverse these decisions, or to abrogate these rights.

F. The view of Spanish and Mexican law adopted by the courts below and made the basis for excluding the Walapai Tribe from the scope of protection given other tribes is erroneous and has been so held by this Court.

Against the cumulative weight of the judicial, legislative, and executive authorities enumerated in the foregoing pages the opinion of the court below (R. 210) advances an argument based on two false premises: (a) that the occupancy rights of the Indians of the Mexican Cession area under United States law are to be measured by their rights under Spanish and Mexican law, and (b) that under Spanish and Mexican law the rights of Indian occupancy were inferior to those rights recognized under the law of the United States. It will, therefore, be necessary to examine these two assumptions.

The first of these premises is not supported by reason or authority. Notice has already been taken of the decisions of this Court in the *Cramer* case, the *Shoshone* case, the *Santa Rosa* cases, the *Kagama* case, and other cases in which protective rules generally applicable to Indians of the United States, including the rule protecting against trespass lands held by aboriginal occupancy, have been held applicable to Indians of the Mexican Cession area. It has been shown that while the United States did undertake, in various treaties, to respect all property rights enjoyed under prior sovereignties by the inhabitants of ceded areas, it never undertook to prevent such inhabitants from acquiring whatever new rights were allowed under the law of the United States generally to inhabitants of the United States. If, therefore, as the complaint in this case alleges, the Walapai Indians continued in possession of their ancestral homes after the treaty of Guadalupe Hidalgo, petitioner contends that the fact of possession, under the United States flag, had exactly the same legal significance as the possession of any other group of Indians in the territory of the United States. Under the view taken by petitioner, therefore, the law of Spain and Mexico is entirely irrelevant to this case and could become relevant only if these Indians claimed, which they do not, some special title under Spain or Mexico higher than the right of occupancy which is here asserted. Since Spanish and Mexican law cannot properly be invoked to *limit* the rights which the United

States accords to all Indians, petitioner submits that questions of Spanish and Mexican law are irrelevant to this case and that the decision below which, in departing from the *Buttz* case, is squarely based upon alleged peculiarities of Spanish and Mexican law, is therefore erroneous.

If, however, petitioner's contention that Spanish and Mexican law is irrelevant to this case be rejected as unsound, it then (and only then) becomes necessary to determine whether in truth the law of Spain and Mexico refused to Indian occupancy the character of legality which was accorded to Indian occupancy by the law of the United States. Petitioner submits that a careful examination of the original sources of Spanish and Mexican law will demonstrate that this law was at least as generous in its recognition of the legality of Indian aboriginal occupancy as the law of the United States. Indeed, the greatest experts on this subject have concluded that the law of the United States, recognizing the occupancy rights of Indian tribes, was derived from Spanish sources.[43]

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[43] See *Johnson* v. *McIntosh*, 8 Wheat. 543, 573 (1823); *Worcester* v. *Georgia*, 6 Pet. 515, 546 (1832). See the comment of James Brown Scott, former Solicitor for the Department of State, and President of the American Institute of Law, the American Society of International Law, and the Institut de Droit International: "* * * in the lectare of Vitoria on the Indians, and in his smaller tractate on War, we have before our very eyes, and at hand, a summary of the modern law of nations." The Spanish Origin of International Law (1928), 21. And note the characterization of Victoria [illegible] the Seventh Pan American Conference, December 23, 1933 [illegible] the man who "established the foundations of modern international law." Scott, The Catholic

This is not to say that the Spanish administrators were always scrupulous in according to the Indians under their protection the full measure of right which the law of Spain allowed.[44] Much misunderstanding has arisen from a failure to appreciate the wide gaps that often existed between Spanish law and Spanish administration, but it must in fairness be acknowledged that equally wide gaps have existed between the law of Indian affairs and the administration of Indian affairs in the United States. It was of the famous decision of this Court, delivered by Chief Justice Marshall, in the case of *Worcester* v. *Georgia,* 6 Pet. 515 (1832), that President Jackson was reported to have said, "John Marshall has made his decision; now let him enforce it."[45] and it is a matter of history that the "successful" plaintiff "liberated" by this Court continued to languish in a Georgia prison under a Georgia law declared unconstitutional by Supreme Court decision. The records of this Court show many cases

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Conception of International Law (1934), VII. And see footnotes 49 and 53, *infra.*

[44] Cyrus Thomas, in his introduction to volume 2 of Royce's Indian Land Cessions in the United States notes:

"Although the cruelty of the Spaniards in their treatment of the Indians during the conquest of Mexico and Central America is proverbial, yet an examination of the laws of Spain and ordinances of the King show that these acts were not only not warranted thereby, but in direct conflict therewith. * * *" (At p. 539.)

[45] Greeley, American Conflict (1864), Volume 1, page 106.

in which it has been held that the administration of Indian affairs failed to accord to the Indians concerned the full measure of their legal rights.[46] Administration is thus an inadequate yardstick for the measurement of Indian legal rights.

The law of Spain and Mexico as distinguished from the administrative practices of these sovereignties, recognized the national character of the Indian tribes, applied to these tribes the relations of war and peace applicable to other civilized or barbarian nations, and recognized the capacity of the Indians to hold property under laws and customs antedating the Spanish Conquest.

The first Spanish writer on the subject of Indian property rights was Franciscus de Victoria, who acted as legal adviser on Indian affairs to the Emperor of Spain. In 1532, called upon to advise on the rights of Spain in the New World,[47] Victoria, after considering in detail the argument that barbarians could not own land by reason of the sin of unbelief or other mortal sin, or by reason of "unsoundness of mind," reached the conclusion that

> the aborigines in question were true owners, before the Spaniards came among them,

[46] See footnotes 32–42, *supra*, and see Cohen, Handbook of Federal Indian Law (1941), 125.

[47] Victoria, De Indis et de Jure Belli Relectiones (1557) (Trans. by J. P. Bate, 1917). See Introduction by Nys, page 71 *et passim*. And see J. B. Scott, The Spanish Origin of International Law (1928), 19.

both from the public and the private point of view."

Since the Indians were "true owners," Victoria held, discovery could convey no title to their lands upon the Spaniards, for title by discovery can be justified only where property is ownerless.[48] Nor could Spanish title to Indian lands be validly based upon the divine rights of the Emperor or the Pope,[50] or upon the unbelief or sinfulness of the aborigines.[51] Thus, Victoria concluded, even the Pope had no right to partition the property of the Indians, and in the absence of a "just war" only the voluntary "consent of the majority" of an Indian nation or tribe could justify the annexation of its territory.[52]

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[48] Victoria, *op. cit.*, sec. 1, p. 128.

[49] *Ibid.*, sec. 2, p. 139. Accord: Grotius, Mare Liberum (1657), chapters 2, 5, quoted by Nys at p. 86, *op. cit.*

[50] Victoria, *op. cit.*, sec. 2, pp. 129–149.

[51] *Ibid.*, *sec.* 3, pp. 151–162.

[52] *Ibid.* It is worth noting, since the *ex cathedra* pronouncements of the Pope may be regarded as part of the early Spanish law (see Walton, The Civil Law in Spain and Spanish America (1900), 43–48), that Pope Paul III, in 1537, in accordance with the teachings of Victoria, declared:

"* * * that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should

Victoria, however, recognized a distinction between jurisdiction and possession, and it was this distinction, confirmed by Grotius and Vattel,[53] that became, under the hand of Chief Justice Marshall, the guiding thread in our constitutional law respecting Indian possession. Exclusive jurisdiction over Indian territory might be acquired by discovery and papal grant, Victoria conceded, "because, if there was to be an indiscriminate inrush of Christians from other parts to the part in question, they might easily hinder one another and develop quarrels * * *."[54] This exclusive ju-

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the contrary happen, it shall be null and of no effect" (From the Papal Bull *Sublimis Deus*, translated in: F. A. MacNutt, Bartholomew de Las Casas: His Life, His Apostolate, and His Writings (1909), pp. 429, 431.)

The close parallelism of the Spanish view and the view adopted by the United States is apparent if one compares the foregoing passage with the language of Article 3 of the Northwest Ordinance, adopted by the Congress of the United States on July 13, 1787:

"The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

[53] Victoria, *supra*, Introduction (Nys). See also Vattel, Le Droit des Gens (1758), vol. 1, bk. 1, ch. 18, sec. 209, and other authorities on international law cited by counsel for both parties in *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823).

[54] Victoria, *op. cit.*, p. 157. *Accord: Johnson* v. *McIntosh*, *supra*, at 573; *Worcester* v. *Georgia*, *supra*, at 546.

risdiction would suffice to bar Indian intercourse with other nations.[55] But lordship in jurisdiction "* * * does not go so far as to warrant him [the Emperor] in converting provinces to his own use or in giving towns or even estates away at his pleasure."[56] Thus, Victoria concluded, "at the time of the Spaniards' first voyages to America they took with them no right to occupy the lands of the indigenous population."[57]

This doctrine was followed by Grotius, who insisted that discovery, in itself, did not confer upon the discoverers any rights of ownership unless consummated by actual occupancy of the lands claimed.[58] It was this distinction between jurisdiction and possession that Chief Justice Marshall emphasized when he declared, in the case of *Worcester* v. *Georgia,* that the claim of a European sovereign to

> the sole right of acquiring the soil and of making settlements on it * * * regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found

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[55] Victoria, *op. cit.*, p. 157.

[56] *Ibid.*, p. 134.

[57] *Ibid.*, p. 138.

[58] Grotius Mare Liberum (1657), chs. 2, 5. See Victoria, *op. cit.*, p. 86.

> that right on a denial of the right of the possessor to sell. (At p. 544.)

Thus, the attitude of Spanish law towards Indian land occupancy was not materially different from the doctrines laid down by this Court, which, while recognizing the *power* of the sovereign to extinguish Indian possessory rights, recognize at the same time that where the Indian right of use and occupancy has not been expressly and clearly terminated by law, such possessory rights remain valid against all third parties.

This view, first affirmed by Victoria, and reaffirmed by the writers on international law who were cited as authorities in early Federal litigation on Indian property rights,[59] underlies the Spanish legislation on the subject for a period of some three centuries. Throughout this period Spanish law recognized Indian property rights in land, anteceding Spanish sovereignty, as creating implied limitations upon Spanish grants.

Many provisions of this character are to be found in the Recopilacion de Leyes de Las Indias. Thus Book 4, Title 12, Law 9, declares:

> We command that the farms and lands which may be granted to Spaniards be so granted without prejudice to the Indians; and that such as may have been granted to their prejudice and injury be restored to whoever they of right shall belong.[60]

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[59] See fn. 53, *supra*.

[60] Law of June 11, 1594, Recopilacion de Leyes de Las Indias (1841, Madrid). Translation from White's New

This recognition of Indian possessory rights went so far that even where Indians were resettled in new areas, in accordance with the established policy of Spain,[61] Spanish law protected their possessory right in their former lands. Thus Law 9 of Title 3, of Book 6, declared:

> Whereas the Indians would sooner and more willingly be reduced into settlements, if they were allowed to retain the lands and improvements which they may possess in the districts from which they shall remove; we command that no alteration be made therein, and that the same be left to them, to be owned as before, in order that they may continue to cultivate them and to dispose of their produce.[62]

Included in the Recopilacion are laws requiring special proceedings to determine whether farms owned by Spaniards are located to the prejudice of the Indians, and requiring the removal of any such farms;[63] and requiring the King's

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Recopilacion of the Laws of Spain and the Indies (1839), vol. 2, p. 51. *Accord:* Book 4, Title 12, Law 18 (erroneously cited as Law 17 in White's New Recopilacion), Law of March 16, 1642, reaffirmed by Law of June 30, 1646, 2 White's New Recopilacion, p. 54.

[61] Recopilacion, Law 1, Title 3, Book 6, derived from act of March 21, 1551.

[62] Law of February 19, 1560, 2 White's New Recopilacion, p. 59.

[63] Book 2, Title 31, Law 13, Instruction to Viceroys, 1596, ch. 21.

attorney to appear on behalf of the Indians in all land cases, and in all cases involving land grants.[64]

In 1687, the King of Spain was grieved to find that white ranch owners

> are encroaching upon the lands of the latter (Indians), taking the same away from them, either by fraud or violence, by reason of the poor Indians abandoning their houses and settlements this being what the Spaniards long for and aim at, * * *.[65]

That injuries were, in fact, committed against Indians by Spaniards is clear, but the Spanish law required that such injuries should be punished more severely than injuries against Spaniards.[66]

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[64] Law of May 24, 1571, Book 2, Title 18, Law 36, 2 White's New Recopilacion, p. 34. Another law provided that where the suit was between the Indians and the Crown, a special attorney for the Indians should be appointed by the Court. Law 35, approved February 13, 1554.

[65] Royal Cedula, June 4, 1687, translated in Hall, Laws of Mexico (1885), p. 64.

[66] The Law of December 19, 1593, provides:

Ordenamos y mandamos que sean castigados con mayor rigor los espanoles que injuriaren, u ofendieren, o maltrataren a indios, que si los mismos delitos se cometiesen contra espanoles y los declaramos por delitos publicos.

(We ordain and command that Spaniards who injure or offend or maltreat Indians shall be punished with greater severity than if the same tortious acts had been committed against Spaniards, and we declare such acts to be public offenses.)

Spanish legislation provided a firm basis for prescription against the Crown.[87]

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[87] Law 4 of Title 8, of Book 11, of the Novisima Recopilacion, published in Madrid in the year 1805 (2 White's New Recopilacion, pp. 154–155), declared:

"Whereas some persons in our kingdoms hold and possess some cities, towns, and villages, and civil or criminal jurisdictions, without having for them either our title or that of the kings, our predecessors, and it is doubtful if the said persons could acquire against us and our crown for any time: We ordain and command that immemorial possession, proved according to, in conformity with, and with the qualities which the law of Toro requires, which is Law 1, Title 17, Book 10, that it may suffice to give title against us and our successors, to any cities, towns, or villages, or places, of civil or criminal jurisdiction, and any thing or part of it, with the things to the sovereignty and jurisdiction annexed and belonging, provided that the said time of said prescription shall not be interrupted nor changed by us or by our order, or otherwise in our natural or civil name.

"Law 1, Title 17, Book 10, to which the foregoing refers, is as follows:

"We order that the [mayorasgo] inheritance may be proved by the writing of the institution of it, with the writing of the [*licencia*] authorized officer of the king who gave it, the said writings being such as to entitle them to credit; or by witnesses who may depose which the law directs of the tenor of said writings, and likewise by immemorial custom, proved with the qualities which the said effects or inheritances derive from their previous possession. It is to know that the elder legitimate children and their descendants succeeded to the said effects by means of inheritance, in case the possessor of it shall have left other legitimate children, without giving them of what they succeed to in the said estate, any thing or equivalent for the succession in it; and that the witnesses be of good repute, and that they say that thus they saw them for the period of forty years, and thus they heard it said of their elders and ancestors, and thus

Again, we find included in a treaty between Spain and the Tallapuche Indians, dated June 1, 1784, a complete recognition of the right of the Indians to the lands that they hold "according to the right of property with which they possess them." (Art. 13.)[68]

No provision of the Spanish law governing Indian affairs has been found which would make Indian possessory rights dependent upon a royal grant. The whole theory of the Spanish law on this subject is that Indian property rights preceded the Spanish Conquest, and continued, except insofar as the Spanish Crown itself might terminate such rights. The fact that the Spanish Crown might terminate such rights, with or without compensation, does not disprove the existence of the right. The fact is that the Spanish Crown, by royal statute, might, and sometimes did, deprive Spaniards of their lands with equal impunity. In short, under Spanish law, the only lands in which no Indian right was recognized were lands which no Indians occupied.[69]

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they always saw and heard, and also that they never saw or heard say to the contrary, and that regarding it, it is the public voice and report and common opinion amongst the neighbours and inhabitants."

[68] 2 White's New Recopilacion, pp. 318, 321.

[69] Thomas' Introduction to Royce's Indian Land Cessions in the United States (1899), vol. 2, p. 539. Such unoccupied territory, Thomas observed, "was designated 'waste lands' and formed part of the royal domain."

If we turn from the original sources of Spanish law to the interpretations which have been placed upon that law by this Court in past cases, we shall find again an unbroken current of authority to the effect that Spain, no less than the United States, recognized aboriginal possession as legitimate, and as protected legally against all trespass until such time as the sovereign might see fit to terminate such possession. Thus, in the leading case of *Worcester* v. *Georgia, supra,* Chief Justice Marshall observed that Spain, like the United States, recognized aboriginal Indian occupancy as lawful and as creating a limited property right in the Indians, subject only to divestiture by the Government itself. That such rights of Indian occupancy did not depend for their validity upon any grant or charter is made abundantly clear in the decisions of this Court. As was said in *Choteau* v. *Molony,* 16 How. 203 (1853):

> Spain, at all times, or from a very early date, acknowledged the Indians' right of occupancy in these lands, but at no time were they permitted to sell them without the consent of the king. (At p. 229.)

The lands referred to in the *Choteau* case were lands ceded by Spain to France and by France to the United States. However, when these lands belonged to Spain they were subject to the Laws of the Indies, to the same extent and in the same way as the lands later ceded by Mexico.

It is true that this Court recognized a distinction between the lands considered in the *Choteau* case, which belonged to a Plains tribe, the Fox Indians, and such lands as might be claimed under pueblo grants. Lands under pueblo grant, the Court thought, might be sold with the approval of subordinate officials, while lands such as those held by the Fox Indians under aboriginal occupancy could be sold to third parties only with the governor's approval. The court explained:

> We are now speaking of Indian lands, such as these were, and not of those portions of land which were assigned to the Christian Indians for villages and residences, where the Indian occupancy had been abandoned by them, or where it had been yielded to the king by treaty. (At p. 237.)

That the aboriginal title of the Indians was recognized under Spanish law as involving a limited right of alienation, as well as a right of use, is made clear by the opinion of this Court in *Mitchel* v. *United States,* 9 Pet. 711 (1835), where it was said:

> The Indian right to the lands, as property, was not merely of possession; that of alienation was concomitant; both were equally secured, protected, and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the king. Such purchases enabled the Indians

> to pay their debts, compensate for their depredations on the traders resident among them, to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which, by their laws or municipal regulations, was necessary to vest a title. (At p. 759.)

An illuminating analysis of the Spanish law on aboriginal possession was made by this Court in *Carino* v. *Insular Government of Philippine Islands*, 212 U. S. 449 (1909). Remembering that the laws of the Indies applied equally to the East Indies and the West Indies, we can find little distinction between the claim of aboriginal occupancy upheld in that case and the claim considered in the case at bar. In the *Carino* case, this Court held that under Spanish law natives in possession of land were, in effect, owners, irrespective of Spanish royal grant, and observed that Spain, upon acquiring sovereignty over a country, did not thereby assume to convert all of the native inhabitants into trespassers or even into tenants at will.

The fundamental fact in the *Carino* case, as in the case at bar, is that long-continued possession—"one of the profoundest factors in human thought" (Holmes, *J.*, at p. 459), was never disturbed by the sovereign, who alone had power to disturb it, and continued to the date of the suit. The opinion of this Court, written by Mr. Justice Holmes, declared:

> If the applicant's case is to be tried by the law of Spain we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers or even into tenants at will. For instance, Book 4, Title 12, Law 14 of the Recopilacion de Leyes de las Indias, cited for a contrary conclusion in *Valenton* v. *Murciano*, 3 Philippine, 537, while it commands viceroys and others, when it seems proper, to call for the exhibition of grants, directs them to confirm those who hold by good grants or justa prescripcion. It is true that it begins by the characteristic assertion of feudal overlordship and the origin of all titles in the king or his predecessors. That was theory

and discourse. The fact was that titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in their books.

Prescription is mentioned again in the royal cedula of October 15, 1754, cited in 3 Philippine, 546: "Where such possessors shall not be able to produce title deeds, it shall be sufficient if they shall show that ancient possession, as a valid title by prescription." It may be that this means possession from before 1700, but at all events the principle is admitted. As prescription, even against crown lands, was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Philippines in regard to lands over which Spain had only a paper sovereignty. (At pp. 460–461.)

What has been said of Spanish law on the subject of Indian occupancy rights is applicable as well to the law of Mexico.[70] Except where amended or where inconsistent with Mexican independence, the laws of Spain remained in force under Mexican sovereignty,[71] in accordance with the usual rule of international law,[72] for Mexico as an independent state accorded certain new rights to In-

[70] 1 White's New Recopilacion, p. xi.

[71] Rockwell, Spanish and Mexican law (1851), pp. 17–18; Hall, Laws of Mexico (1885), secs. 85, 159.

[72] "* * * according to the established principles of the law of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereignty." *Mitchel v. United States*, 9 Pet. 711, 748 (1835).

dians[73] but did not presume to deprive them of the rights of occupancy which the Spanish Crown had respected.[74] There is no suggestion in this case of any Mexican law, decree, or grant terminating Indian possession of the lands here in suit, just as there is no suggestion of any Spanish law, decree, or grant terminating that possession.

There is no suggestion in the record that any white man ever attempted to settle or otherwise interfere with Indian occupancy in the barren and inaccessible country of the Walapai during the entire period of Spanish and Mexican sovereignty. If, then, the Indians at the time of the Mexican Cession had no possessory rights in the lands they occupied, it must have been because the paper claim of the Spanish Crown to sovereignty over their territory *ipso facto* deprived all the Indians therein of all possessory rights in land and ren-

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[73] Thus under the "Plan of Iguala," adopted on February 24, 1821, and incorporated in the Mexican Declaration of Independence of October 6, 1821, it was provided that "all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, * * *" and further that "the person and property of every citizen will be respected and protected by the government." See *Territory* v. *Delinquent Tax List*, 12 N. M. 139, 76 Pac. 307 (1904) and sources cited.

[74] To the effect that under Mexican sovereignty "all those laws, which establish different regulations, according to the diversity of races, still remain in force, when they concede some rational and substantial favor, though not, when without reason, they subject any class to a distinction ridiculous and abhorrent," see *Sunol* v. *Hepburn*, 1 Cal. 255, 280 (1850), citing *Febrero Mejicano*, vol. 1, p. 97.

dered them trespassers, or at best tolerated intruders, in their own domain. The opinions of Chief Justice Marshall and of Justice Holmes, above quoted, demonstrate the unsoundness of any such doctrine.

Nevertheless this erroneous view of Spanish law has been earnestly argued by respondent, and the judgment order of the trial court appealed from incorporates (R. 192) the respondent's argument on this point, which is in turn quoted (R. 145—189) from a brief and testimony in another case, namely *Pueblo of Santa Rosa* v. *Fall*, discussed at pp. 34–35, *supra*. Significantly enough, although this brief and this testimony were accepted as a correct statement of the law of Spain and Mexico by the court to which they were originally addressed, the decision thus reached had to be reversed on appeal to this Court. In the case cited the Government argued that the Papago Indians who instituted that suit had no possessory right in any land, under Spanish and Mexican law, and that their suit to enjoin the Secretary of the Interior from interfering with such possessory rights should therefore be dismissed on the merits. In the course of this argument the claim was put forward that Indians under Spanish and Mexican law had no rights in land except such rights as were conferred by grant of the sovereigns. The Court of Appeals for the District of Columbia accepted this as a correct state-

ment of law, and ordered the suit dismissed on the merits. This decision was reversed on appeal to this Court. This Court took the position that the land in question (in which, according to the quoted brief, Indians had no recognizable interest), came within the protection of the Indian trade and intercourse laws, and particularly of the statutory restrictions against alienation of Indian lands, and that this was true "whether the Indians concerned are to be classified as nomadic or Pueblo Indians." (273 U. S. 315, 320.) Finding that the attorney bringing the suit had no authority to do so because his contract with the Indians had not been validly executed pursuant to the laws governing Indian land claims, this Court held that

> * * * the cause must be remanded to the court of first instance with directions to dismiss the bill, on the ground that the suit was brought by counsel without authority, but without prejudice to the bringing of any other suit hereafter by and with the authority of the alleged Pueblo of Santa Rosa. (At p. 321.)

The argument that Spanish and Mexican law recognized no Indian rights based on occupancy, which this Court rejected in 1927, has not acquired any validity in the years that have elapsed since that rejection.

Point 2

SUCH RIGHTS OF THE WALAPAI TRIBE AS EXISTED ON JULY 27, 1866, HAVE NOT BEEN EXTINGUISHED SINCE THAT DATE BY THE UNITED STATES OR ABANDONED BY THE WALAPAI TRIBE.

If it be true, as the courts below thought, that at the time of the grant to the railroad on July 27, 1866, the Walapai Indians had no possessory rights in the lands they occupied, there is, of course, no point in the question whether such possessory rights were subsequently extinguished. Various arguments have been advanced, however, in the briefs and opinions below to show that even if the Walapai Indians were entitled to rights of occupancy in the lands claimed, or part of them, as of July 27, 1866, these rights were subsequently extinguished. It is necessary to meet this contention.

Termination of Walapai possessory rights as to all or part of the land which this tribe held by aboriginal occupancy must have occurred, if it occurred at all, in one of two ways: either through voluntary abandonment on the part of the tribe or through extinguishment of Indian title by the Federal Government. As for the claim of voluntary abandonment, it is sufficient to note that the complaint in this case alleges, and evidence available for the trial of this case demonstrates, that the lands claimed in this suit were occupied continuously by the Walapai Tribe at all times relevant to the case and that there was thus no abandon-

ment of these lands by the Indians. Certainly, if there had been a voluntary abandonment of these lands by the Indians that would be a matter of proof on the part of the respondent and at the present stage of proceedings no such proof has been made.

We may therefore restrict our consideration for the present to the claim that Walapai occupancy rights have been extinguished by the Federal Government. Such extinguishment, if it occurred at all, must have occurred either through action of the Federal Government pursuant to the act of July 27, 1866, or through action superseding and modifying that act. Fortunately, the 1866 act describes with complete clarity the way in which Indian title existing in public-domain lands conveyed to the railroad was to be extinguished. It was to be extinguished (a) by the United States, (b) as rapidly as might be consistent with public policy and the welfare of the Indians, and (c) only by the voluntary cession of the Indians themselves. These criteria were well understood and administratively practicable. We have already noted a series of treaties and agreements by which relinquishments of Indian possessory rights along the proposed right-of-way of respondent's predecessor were effected.[75]

By such a treaty ratified by the Senate, or by such an agreement ratified by Congress, the United

[75] See footnote 26, *supra*.

States might have extinguished the aboriginal title of the Walapai Tribe, in accordance with the criteria of the 1866 act, as to all or any part of the Walapai country. Constitutionally, the United States may still enter into such a formal agreement, or even a treaty. That would be the simple and natural way of carrying out the commitments made in the 1866 act. On the other hand, if the United States failed to secure a cession of Indian lands on reasonable terms, the course of eminent domain was always open, and remains open, even though the legislative authorization of such a course might amount to a repeal or modification of the 1866 act. (*Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641 (1890).)

With these alternatives before the Federal Government, the course of its action after 1866 may be examined to determine whether or not it legally extinguished Walapai possessory rights in all or any part of the lands here in litigation.

A. The 1870 act appointing a Surveyor General for Arizona did not extinguish the occupancy rights here asserted.

In the first place, an attempt has been made to read the language of extinguishment or forfeiture into a provision in the appropriation act of July 15, 1870 (16 Stat. 291, 304) (Appendix I, H), providing for the appointment of a Surveyor General for Arizona charged with the investigation of Spanish and Mexican land titles. It

is no doubt true that the Surveyor General did not consider claims based upon Indian rights of occupancy that antedated Mexican or Spanish sovereignty. This proves nothing at all. The Surveyor General was not directed to define the boundaries of Indian country. Rather, he undertook the narrower task of verifying titles originating under Spanish or Mexican grants, and his conclusions are therefore irrelevant to a question of Indian occupancy not based upon such a grant. See *Cramer* v. *United States*, 261 U. S. 219, 231 (1923). But even if he had tried to examine into the scope and extent of Indian occupancy rights, the fact that he never made a report on the Walapai would not show that the Walapai had no such rights. The Surveyor General of New Mexico under similar legislation reported on various Pueblo claims under alleged Spanish grants. He did not include in his list the claims of the Pueblos of Santa Ana and Zuni, but this did not prevent Congress in 1869 from recognizing the validity of the title claimed by the former pueblo[76] or, in 1931, that of the latter.[77] Nor did these omissions by the Surveyor General prevent administrative recognition and protection of the lands of these two pueblos prior to such congressional confirmation.

The legislation setting up the offices of Surveyor General for Arizona and New Mexico did not in

[76] Act of February 9, 1869 (15 Stat. 438).

[77] Act of March 3, 1931 (46 Stat. 1509).

terms cut off any Indian occupancy rights and was not intended to do so. In this, the legislation must be distinguished from the act setting up a court of private land claims for California (act of March 3, 1851, 9 Stat. 631), which specifically referred to Indian claims (sec. 16) and declared invalid all claims derived from the Spanish or Mexican Government not presented within two years and all claims not confirmed by that court (sec. 13). *Barker* v. *Harvey*, 181 U. S. 481 (1901). The legislation designed to scrutinize land claims in Arizona and New Mexico was similar to that which covered land claims in Louisiana Territory. Section 2 of act of March 2, 1805 (2 Stat. 324, 325). The decisions of this Court in *Choteau* v. *Molony*, 16 How. 203 (1853); *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55 (1886); and *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938), make it clear that the act of 1805 did not destroy all Indian titles in the Louisiana Territory. No more did the 1870 act destroy all Indian titles in Arizona.

It is clear that the 1870 act appointing a Surveyor General for Arizona, and the action taken thereunder, did not amount to an extinguishment of land title with Indian consent in the manner prescribed by the act of July 27, 1866. It is equally clear that it did not amount to an amendment or repeal by implication of the 1866 act. It follows, therefore, that the 1870 legislation left intact whatever rights of possession existed in the Walapai Tribe on July 27, 1866.

B. The temporary removal in 1874 of part of the Walapai Tribe to the Colorado River Reservation did not extinguish the possessory rights here asserted.

Again, the court below has maintained (R. 211) that the forcible removal of the Walapai Indians to the Colorado River Reservation in 1874 amounted to an extinguishment of Indian title. The court, in its opinion, declares:

> In 1874 the Walapai were forcibly taken to their reservation. There could not be a more effective denial of the possessory rights of the Walapai to lands outside their reservation than this act of forcible expulsion from such lands by executive action in accordance with the act of Congress creating the reservation (R. 211).

This argument is based upon an erroneous view of the facts and of the law. In the first place the fact is that only 580 out of approximately 1,500 Walapai Indians were ever actually removed to the Colorado River Reservation.[78] The complaint alleges (R. 5, 8, 9, 15, 16, 18), and evidence available for introduction at the trial demonstrates,[79] that lands claimed in this suit outside the area of the Colorado River Reservation were continuously occupied at all times material to the case, including the year 1874, by Walapai Indians. In the second place, as a matter of law, it is well established that

[78] See Appendix, pp. 45–50.

[79] See Appendix, pp. 42–44.

forcible removal does not extinguish Indian rights of occupancy. *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308 (1930).[80] The doctrine that forcible removal of individuals of a particular race to concentration camps results legally in a loss of possessory rights in land has no place in the law of a civilized nation. This Court has held that the exercise of military force against Indians is not the true measure of their legal rights. *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937); *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938). If, under the law of the United States, the Walapai Tribe had rights to occupy certain lands, then the Army could not, by temporarily confining some Walapai Indians in what amounted to a military concentration camp, take those rights away, and the rights continued to exist despite anything the Army did.

Certainly, the forcible removal of 580 Walapai Indians to the Colorado River Reservation in 1874 was entirely deprived of any significance, even minute, as a denial of the right of occupancy, when in 1875 (Walapai Papers, 104, 108), these Indians fled from that reservation and the civil

[80] In the case of *New York Indians* v. *United States*, 170 U. S. 1 (1898), this Court, in rejecting the contention that Indian occupancy rights in a certain area had been "abandoned" by refusal of the Indians to settle within the area, declared: "To create an abandonment there must not only be an omission to prosecute, but an intent to forego, of which there is no evidence in this case." (At p. 35.)

and military authorities agreed not to order their return.[81]

Here, too, it is clear that the action of the Federal Government in 1874 neither amounted to an extinguishment of Indian title with Indian consent in the manner prescribed by the act of July 27, 1866, nor constituted a modification or repeal of that legislation.

C. The establishment of an Executive order reservation for the Walapai Indians in 1883 did not extinguish the possessory rights here asserted.

A further argument has been made that the establishment of the Walapai Reservation in 1883 amounted to an extinguishment of Indian rights in lands outside the reservation. In so far as this argument relies upon the assumption that the Walapai Reservation as actually established was accepted by the Walapai Indians as a *quid pro quo* for the relinquishment of all other possessory rights, the argument is not supported by any evidence. No evidence has been put forward to demonstrate that any Walapai Indians moved, or agreed to move, on to the Executive order reservation. The complaint alleges (R. 15, 16, 18), and evidence is available to prove,[82] that lands outside of the 1883 reservation were continuously and exclusively occupied by the Walapai Indians from

[81] See Appendix, pp. 46–50.

[82] See Appendix, pp. 34–36, 39–50.

before 1883 to the time of the institution of this suit.

As a legal matter, the argument that the establishment of the 1883 reservation extinguished possessory rights elsewhere is subject to the same infirmity that has been noted above in considering the parallel argument that the establishment of the Colorado River Reservation necessarily extinguished Indian occupancy rights elsewhere.

Finally it should be noted that if this argument were valid it would show only a relinquishment of possessory rights *outside* of the reservation boundaries. That would not justify the decision of the courts below, which, in effect, declares that Indian possessory rights within the reservation boundaries, in the lands claimed by the railroad, have been extinguished.

Once more, it is plain that this administrative action was neither an extinguishment of Indian title with Indian consent in the manner prescribed by the act of July 27, 1866, nor a modification of that act.

D. The 1925 Exchange Act did not extinguish the possessory rights here asserted.

It is contended (R. 211) that Walapai occupancy rights were denied or extinguished by the act of February 20, 1925 (43 Stat. 954) (Appendix I, I), which authorized exchanges of Indian land for non-Indian land within the reserva-

tion boundaries. This argument, if valid at all, would apply only to lands within the reservation and not to lands outside; therefore, if this were the only valid argument for the extinguishment of Indian possessory rights, it would be insufficient to sustain the ruling of the courts below. However, the argument itself is without force.

The act of February 20, 1925, does not show a denial of Indian occupancy right in any particular tract, notwithstanding the contrary reasoning of the court below (R. 211–212). That act authorized the Secretary of the Interior to "accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation * * *." The strongest implication that can be read into the 1925 act is that there is *some* land within the boundaries of the reservation that does not belong to the Indians. But this statute cannot be used to show that any particular tract does not belong to the Indians. Much less can it be used to show that all of the reservation lands here in dispute belong to the railroad.

The act of February 20, 1925, did not constitute an extinguishment of Indian title with Indian consent pursuant to the method prescribed by the act of July 27, 1866; and this act obviously was neither amended nor repealed by the 1925 act.

E. The possessory rights here asserted have not been terminated by the petitioner and cannot be terminated by the respondent.

The record of legislation reviewed above indicates that Congress never did terminate the possessory rights of these Indians either by securing their voluntary cession of the lands in question, as prescribed by the act of July 27, 1866, or by expressly or impliedly repealing or amending the 1866 act.

To accomplish an extinguishment of the right of occupancy claimed in this case a statute terminating the right in unmistakable and express terms would have to be found. Congress acts habitually upon Indian land matters in express language, and that is especially true when a forfeiture of right is involved. The Walapai Indians should not, and Congress did not intend that they should, lose their rights to occupy the land by mere logomachy, nor by an intricate process of statutory construction and implication.[83] The extinction of right must appear clearly. 34 Op. Atty. Gen. 171, 172. *Cf. Leavenworth, Lawrence and Galveston R. Co.* v. *United States,* 92 U. S. 733, 740 (1875). No statute, no governmental action

[83] In the case of *New York Indians* v. *United States*, 170 U. S. 1 (1898), this Court, in rejecting the argument that the plaintiff Indians had abandoned certain lands, declared: "A condition, when relied upon to work a forfeiture, is construed with great strictness." (At p. 25.) Accord: *Holden* v. *Joy*, 17 Wall. (84 U. S.) 211 (1872).

of any nature, in express terms or otherwise, has destroyed the rights of the Walapai Tribe. On the contrary, there have been repeated evidences of recognition of the occupancy rights of Walapai and other tribes of the Mexican Cession area, by Congress, by the Executive, and by the railroad itself.[54] An example of Congressional recognition of occupancy rights within former Mexican territory is the act of March 3, 1891 (26 Stat. 854), establishing a court of private land claims to determine land claims in former Mexican territory, including the Territory of Arizona, which provides:

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place. (At p. 860.)

Again, a disclaimer by the State of Utah to any lands held by Indians is contained in the act of July 16, 1894 (28 Stat. 107). New Mexico and Arizona likewise were required to disclaim jurisdiction over lands held by Indians or Indian tribes,

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[54] See pp. 36–46, 47–58, *supra*. Indeed the A. & P. Railroad Co., the predecessor of the defendant railroad, recognized that there were outstanding Indian occupancy titles along its proposed route, and that railroad used the existence of Indian occupancy rights in an effort to have this Court determine the act of July 6, 1886 (24 Stat. 123), declaring a forfeiture of a portion of the A. & P. grant void and ineffectual because the United States had failed to perform its promise to extinguish the Indian titles to the lands along the route of the railroad. *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413 (1897).

"until the title of such Indian or Indian tribes shall have been extinguished." (Act of June 20, 1910, secs. 2, 20, 36 Stat. 557, 569–571; and see Ariz. Const., Art. XX, sec. 4.)

Finally, it may be noted that large sums of money have been appropriated by Congress in performance of the guardianship duty of the Government towards the Walapai Indians (Walapai Papers, 357–359), signifying "a settled purpose to fix the Indians in their country, by giving them security at home." (*Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832).)

A review of the statutes since the Grant Act of 1866 compels the conclusion that the possessory rights enjoyed by the Walapai Tribe prior to the 1866 grant act, and safeguarded by that act, were not destroyed by subsequent legislation, but were consistently safeguarded and preserved.

Point 3

THE UNITED STATES AND THE WALAPAI TRIBE HAVE BEEN DEPRIVED OF A RIGHT TO TRIAL UPON ISSUES OF FACT, THROUGH A MISAPPLICATION OF THE DOCTRINE OF JUDICIAL NOTICE.

The contention of the respondent, argued in its motion to dismiss the complaint (see pp. 6–8, *supra*), that the lands in litigation belonged to the railroad as a matter of "public record and common knowledge" (R. 25) was supported by the following assertions, among others, in its Memorandum of Points and Authorities:

> The Walapai were disunited bands of nonagricultural, nomadic savages who occupied exclusively no definable territory and no place or places for any great length of time (R. 30).
>
> The Walapai have surrendered any claims they may once have asserted inconsistent with defendant's title (R. 71).

If the first of the quoted statements is factually true, and the Walapai Indians were not a tribe and had no permanent territory of their own (as distinguished from lands wandered over by many tribes), then, of course, the petitioner cannot hope to prevail in a suit which is entirely based upon the assertion of continuous possession by the Walapai Tribe of described areas.

Equally, if the second of these statements is factually true, petitioner cannot hope to prevail.

There is no dispute as to the applicable rule of law if either or both of the foregoing factual propositions, incorporated in respondent's motion to dismiss, be true.

The second of the propositions is expressly set forth in the opinion of the Circuit Court below as a ground of its holding (R. 211). The former of these propositions is implicit in that opinion as an alternative ground. That opinion concedes that even within the Mexican Cession area Indians enjoy possessory rights in "exceptional instances as in case of the lands of Pueblo Indians" (R. 206). Presumably the court had in mind such

cases as *Cramer* v. *United States*, 261 U. S. 219 (1923); *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110 (1919); and *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315 (1927), in which the Indians sought to show not simply the usual nomadic occupancy but rather the maintenance of homes, improvements, or agricultural settlements. In dismissing these "exceptional cases" as irrelevant to the case at bar, the Circuit Court assumed the truth of the assertions made by the respondent in its motion to dismiss and incorporated in the opinion of the District Court to the effect that the Walapai Tribe did not maintain permanent homes, improvements, and settlements. If, as petitioner contends, the courts below were mistaken in their factual assumptions as to the character of Walapai occupancy, then even if the courts below were legally correct in drawing a distinction between various kinds of occupancy, the application of that distinction against the Walapai Tribe would be factually unjustified and constitute a misapplication of the doctrine of judicial notice since the facts on this issue were not before the court.

The propositions quoted go to the heart of the pending litigation. Undoubtedly some evidence advanced by the respondent makes these assertions plausible, if the evidence to the contrary is not considered. Such evidence as tends to indicate that the Walapai Indians were not a tribe, that the tribe did not continuously occupy the lands

herein claimed and that the (nonexistent) tribe voluntarily abandoned the tribal claims here asserted was carefully marshalled by the respondent (R. 30–32, 71). The court below seems to have assumed that since all this evidence was found in Government files or printed in a Government document (Walapai Papers, printed by Government Printing Office, 1936), it should take judicial notice of its truth, as well as its existence, and on the basis of such judicial notice should conclude that the allegations in the complaint of continuous possession of the lands in question by the Walapai Indians are obviously false and should be disregarded, thus rendering the complaint inadequate to state a cause of action.

Petitioner respectfully submits that by this interesting but unprecedented procedure the United States and the Walapai Indians have been deprived of a fair trial.

Petitioner does not question the right of the courts below to notice the existence of the various reports of officials and travelers which they have noticed.

Petitioner does, however, protest that the proper scope of judicial notice is exceeded *if assertions in documents judicially noticed are taken to be proved, beyond all possibility of contradiction by countervailing evidence, merely because these assertions are contained in documents attached to a motion to dismiss a complaint instead of being*

offered in evidence during a trial, after issue joined.

The probative force of the evidence collected by the defendant and made the basis of "findings" by the District Court is, to speak moderately, very slight. While the Walapai Indians did not perhaps attain the complete political unity achieved by some other tribes, they had enough unity to merit and receive continued recognition as a tribe by the political arm of the Federal Government whose determinations in such matters are accepted by the courts as conclusive. *United States* v. *Sandoval*, 231 U. S. 28 (1913); *United States* v. *Holliday*, 3 Wall. 407 (1865). The only evidence put forward to prove that the Walapai had no permanent home is a miscellaneous collection of reports of explorers and soldiers who, at various times, found Walapai Indians in various areas and occasionally reported that the Indians they found ate wild foods and dressed in skins, and a further collection of reports of "Seviches," Yavapai, and Apaches sighted within the Walapai Country. If such evidence were presented at the trial of this case, the United States would be prepared to show that the Walapai Indians did inhabit all of the various areas in which explorers found them, and inhabited these various areas not successively but simultaneously, that the so-called "Seviches" were Walapai Indians, that the Yavapai or Apaches found in the Walapai country were either peaceful visitors or raiders, but in neither case claim-

ants of possessory rights therein, and that neither the supplementing of crops by wild foods nor the wearing of furs is incompatible with permanent occupancy of defined areas of land. The United States might further have shown that some of the evidence put forward by the defendant comes from prejudiced or untrustworthy sources. At least there is room for some reasonable doubt as to the objectivity and accuracy of the reports of alleged Indian backwardness that emanate from an official who is advocating the "extermination" of one of the larger tribes under his jurisdiction and feels impelled to add: "I have no objection to seeing them burnt alive, men, women, and children."[85] Under the procedure adopted by the District Court, however, the Government was denied the benefit of all safeguards attending a trial that assure scrutiny of the source and probative force of evidence.

Finally, even if the petitioner were required to prove something more than the usual nomadic tribal occupancy, in the case at bar evidence (including expert testimony, Indian evidence of ancient and continued possession of described areas, and the presentation of documentary materials not thus far presented) is available to show that the Walapai Indians were peaceable, industrious people who engaged in irrigation farming

[85] Letter of Superintendent of Indian Affairs for Arizona, Charles D. Poston, to his successor in office, George W. Leihy, dated April 12, 1865.

long before the white settlers came into the country, who, except on the rare occasions when they were interrupted by troops that burned their homes and destroyed their fields and possessions, maintained permanent villages, settlements, and rancherias with well-recognized ownership rights applied to land and improvements, and who from time immemorial have lived and died in the places where their parents lived and died, to a much greater extent than has been the case with their white neighbors."[36]

Petitioner did not ask the courts below and does not ask this Court to accept these conclusions as facts to be judicially noticed. It asks only for an opportunity to prove these facts by the usual method of a trial, which thus far it has not had, and which, if issues of fact are to be resolved under the theory of judicial notice embraced below, it never can have.

Again, under the theory that judicial notice may be used to reverse the normal rule that factual allegations of a complaint are assumed to be true on a motion to dismiss, the District Court accepted the defendant's contention that the Walapai Indians had "surrendered any claims they may once have asserted inconsistent with defendant's title" (R. 71, 192–195). The only evidence put forward in support of this contention (R. 69) is: (1) a campaign promise by an Arizona Indian agent

[36] See Appendix, pp. 23–37.

unning for Congress that he would, if elected, 'endeavor to lay their claims before the Government," which was followed by an unsuccessful plea in Congress for a large appropriation to provide for irrigating 75,000 acres of land for the Walapai and other Indians and (2) a statement by the Commissioner of Indian Affairs (R. 69, W. P. 33) that he recommended proposing to the Indians a "compromise" by which "on their confining themselves to their reservation" (which they never did) "and yielding all claims to lands beyond it" (which, likewise, they never did), "they shall, in lieu of an annuity in money or supplies, be furnished by the Government with an irrigation canal, at a cost estimated at something near $100,000 which, by insuring them their annual crops, will enable them to support themselves, independently of other aid by the Government" (which the Government never did). A campaign promise of glittering generality and a proposal for an agreement not accepted by either party may be evidence of a sort; but it is carrying the doctrine of judicial notice a long way out of its proper scope to characterize this evidence, put forward to establish a voluntary cession of the lands in suit, as irrebuttable and to deny the petitioner an opportunity to offer countervailing evidence showing that the Walapai Indians never did surrender their possessory rights but persistently, so far as it was within their power to do

so, pressed the claims which the United States after long study and long delay now asserts on their behalf.[87]

The argument of the respondent is not aided simply by the fact that Government officials expressed opinions unfavorable to Walapai occupancy of the lands in suit. There are some questions as to which the fact that responsible Government officials make certain reports is relevant, regardless of the truth of the reports, as for instance upon the constitutional question of whether the legislature may have had a reasonable basis for supposing that certain social conditions existed when it passed a given law. So it may be with other exceptional questions affecting constitutionality or jurisdiction. But the question of actual possession in this case is not of that character. Here the complaint alleges that the Walapai Tribe has at all material times held continuous possession (R. 4, 8, 9, 15, 16) of the lands described, and the courts below have reversed the normal rule that allegations of fact in a complaint are deemed true on demurrer and have concluded that contrary statements about the habits and intentions of these Indians made by various officials in documents attached to a motion to dismiss are to be deemed true and made the basis for adjudicating the issue against the Indians finally, and

[87] See Appendix, pp. 46–50.

bsolutely, and without a trial. Petitioner insists hat the truth of any report or opinion on Walai habits, movements, and possessions is properly ubject to proof, and that petitioner is entitled to day in court on these issues. As this Court said, er Cardozo, *J.*, in the case of *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292 (1937),

> * * * notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, sec. 2567; 1 Greenleaf, Evidence, 16th ed., p. 18. "It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ibid.* Cf. *Skapleigh* v. *Mier*, 299 U. S. 468. Such at least is the general rule, to be adhered to in the absence of exceptional conditions. * * * Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial. (At pp. 301–302.)

What Mr. Justice Cardozo pointed to as the vice of the lower court decision in the *Ohio Bell Telephone* case was—

> * * * that even now we do not know the particular or evidential facts of which

> the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. (At p. 302.)

That, indeed, is the situation in the case at bar. Petitioner does not know to this day what facts the courts below took notice of when they concluded (R. 195–196, 212) that no possible evidence that petitioner might produce would show the kind of settled possession that would, even on the theory of law advanced by respondent (R. 174), give rise to possessory rights. Even the respondent and the courts below admit (R. 206–207) that there are some situations in which continuous possession, as alleged in the complaint (R. 4, 8, 9, 15, 16), does create possessory rights in former Mexican territory. But what kind of possession the petitioner would have to show under this view—whether it would be necessary to show the existence of farms, villages, or irrigation ditches, how continuous and how long such possession would have to be—all these matters are left in the realm of mystery by the use of "judicial notice" to cover a mixture of law, fact, and hearsay evidence.

Petitioner, believing that the truth of allegations of continuous and exclusive occupancy of the lands claimed is a proper subject of trial and proof, has not attempted to try its case in briefs and will not at this stage of litigation make such an attempt.

However, it does undertake to submit in an appendix to this brief, for the consideration of this Court, in the event that this Court shall consider the factual issues pertinent, sample evidentiary materials, designed to show:

(a) That the evidence of which the District Court purported to take judicial notice is incomplete with respect to issues of fact that the District Court purported to decide on the basis of judicial notice.

(b) That evidence not before the District Court tends to show the falsity of the two propositions relied upon as a basis for the motion to dismiss and the order granting that motion, to wit:

> The Walapai were disunited bands of non-agricultural, nomadic savages who occupied exclusively no definable territory and no place or places for any great length of time. (R. 30.)
>
> The Walapai have surrendered any claims they may once have asserted inconsistent with defendant's title. (R. 71.)

Upon the basis of the material thus assembled, petitioner submits that it is entitled to a day in court to present completely evidence, of which the materials assembled in the attached Appendix are only a sample or token, showing that the Walapai Indians did in fact maintain continuous and exclusive possession of the area here in litigation, or

at least of many tracts of land within that area, and never surrendered, or agreed to surrender, that possession.

Respectfully submitted.

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The Solicitor General authorizes the filing of this brief.

CHARLES FAHY,
Acting Solicitor General.

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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

APPENDIX TO BRIEF FOR THE UNITED STATES

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APPENDIX TO BRIEF FOR THE UNITED STATES

I. STATUTES AND TREATIES

A. INDIAN TRADE AND INTERCOURSE ACT OF JUNE 30, 1834

Pertinent provisions of the Indian Trade and Intercourse Act of June 30, 1834 (4 Stat. 729), are:

> SEC. 9. *And be it further enacted,* That if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock.

SEC. 10. *And be it further enacted,* That the superintendent of Indian affairs, and Indian agents and subagents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.

SEC. 11. *And be it further enacted,* That if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.

SEC. 12. *And be it further enacted,* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of

Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless,* That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners [731] of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty.

* * * * *

SEC. 22. *And be it further enacted,* That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

SEC. 23. *And be it further enacted,* That it shall be lawful for the military force of the United States to be employed in such manner and under such regulations as the President may direct, in the apprehension of every person who shall or may be found in the Indian country, in violation of any of the provisions of this act, and him immediately to convey from said Indian coun-

try, in the nearest convenient and safe route, to the civil authority of the territory or judicial district in which said person shall be found, to be proceeded against in due course of law; and also, in the examination and seizure of stores, packages, and boats, authorized by the twentieth section of this act, and in preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law: *Provided*, That no person apprehended by military force as aforesaid shall be detained longer than five days after the arrest and before removal. And all officers and soldiers who may have any such person or persons in custody shall treat them with all the humanity which the circumstances will possibly permit; and every officer or soldier who shall be guilty of maltreating any such person while in custody shall suffer such punishment as a court martial shall direct.

* * * * *

B. PRE-EMPTION ACT OF SEPTEMBER 4, 1841

The pertinent provisions of the act of September 4, 1841 (5 Stat. 453, 455, 456), are:

SEC. 10. *And be it further enacted*, That from and after the passage of this act, every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration of

intention to become a citizen, as required by the naturalization laws, who since the first day of June A. D. eighteen hundred and forty, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions: * * * no lands included in any reservation, by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or for other purposes; no lands reserved for the support of schools, nor the lands acquired by either of the two last treaties with the Miami tribe of Indians in the State of Indiana, or which may be acquired of the Wyandot tribe of Indians in the State of Ohio, or other Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this act * * *.

C. TREATY OF GUADALUPE HIDALGO

The pertinent provisions of the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922, 929, 930), are:

> ART. IX. Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.
>
> * * * * *
>
> ART. XI. Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the Government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the Government of the United States whensoever this may be necessary; and that when they can-

not be prevented, they shall be punished by the said Government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

* * * * *

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the Government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said Government when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

D. ACT OF FEBRUARY 27, 1851

The pertinent provisions of the act of February 27, 1851 (9 Stat. 574), are:

SEC. 7. *And be it further enacted,* That all the laws now in force, regulating trade

and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby, extended over the Indian tribes in the Territories of New Mexico and Utah.

* * * * * *

E. DONATION ACT OF JULY 22, 1854

The pertinent provisions of the act of July 22, 1854 (10 Stat. 308), are:

An Act to establish the offices of Surveyor General of New Mexico, Kansas, and Nebraska, to grant Donations to actual Settlers therein, and for other purposes:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, by and with the advice and consent of the Senate, shall be, and he is hereby, authorized to appoint a Surveyor General for New Mexico, whose annual salary shall be three thousand dollars, and whose power, authority, and duties shall be the same as those provided by law for the Surveyor General of Oregon; * * *

SEC. 2. *And be it further enacted,* That, to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who was residing in said Territory prior to the first day of January, eighteen hundred and fifty-three, and who may be still residing there, there shall be, and hereby is, donated one

quarter section, or one hundred and sixty acres of land. And to every white male citizen of the United States, or every white male above the age of twenty-one years, who has declared his intention to become a citizen, and who shall have removed or shall remove to and settle in said Territory between the first day of January, eighteen hundred and fifty-three, and the first day of January, eighteen hundred and fifty-eight, there shall in like manner be donated one quarter section, or one hundred and sixty acres, on condition of actual settlement and cultivation for not less than four years: *Provided, however,* That each of said donations shall include the actual settlement and improvement of the donee, and shall be selected by legal subdivisions, within three months after the survey of the land where the settlement was made before the survey; and where the settlement was made after the survey, then within three months after the settlement has been made; and all persons failing to designate the boundaries of their claims within that time, shall forfeit all right to the same.

SEC. 3. *And be it further enacted,* That, on proof of the settlement and cultivation required by this act, to the satisfaction of the surveyor general, or other officer designated by law for that purpose, subject to the supervision of the Secretary of the Interior, a certificate shall be issued to the party entitled, on presentation of which, if

approved by the Secretary of the Interior, a patent shall issue thereon:

SEC. 4. *And be it further enacted,* That none of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, or lands settled on and occupied for purposes of trade and commerce, and not for agriculture, and all legal subdivisions settled on and occupied, in whole or in part, for purposes of trade and commerce, and not for agriculture, shall be subject to the provisions of the act of twenty-third of May, eighteen hundred and forty-four, in relation to town sites on the public lands, whether so settled and occupied before or after the survey of said lands, except that said lands shall be donated instead of being sold.

* * * * *

SEC. 7. *And be it further enacted,* That any of the lands not taken under the provisions of this act shall be subject to the operation of the Preemption Act of fourth September, eighteen hundred and forty-one, whether settled upon before or after the survey; and, in all cases where the settlement was made before the survey, the settler shall file his declaration within three months after the survey is made and returned; and any person claiming a donation under this act shall be permitted to enter the land claimed by him at any time prior to the four years' occupancy and cultivation required, by paying therefor at the

rate of one dollar and twenty-five cents per acre, and proving occupancy and cultivation up to the time of such payment.

SEC. 8. *And be it further enacted,* That it shall be the duty of the surveyor general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to

the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

* * * * *

SEC. 10. *And be it further enacted,* That the President of the United States shall be and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, a Surveyor-General for the Territories of Nebraska and Kansas, who shall locate his office at such place as the President of the United States shall from time to time direct, and whose duties, powers, obligations and responsibilities and compensation shall be the same as those of the Surveyor-General of Wisconsin and Iowa, and who shall be allowed the same amount for office rent, fuel, incidental expenses, and clerk hire, as is allowed to said Surveyor-General of Wisconsin and Iowa.

* * * *

SEC. 12. *And be it further enacted,* That all the lands to which the Indian title has been or shall be extinguished within said Territories of Nebraska and Kansas, shall be subject to the operations of the Preemption Act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein men-

tioned: *Provided, however,* That where unsurveyed lands are claimed by preemption, notice of the specific tracts claimed shall be filed within three months after the survey has been made in the field, and on failure to file such notice or to pay for the tracts claimed before the day fixed for the public sale of the lands by the proclamation of the President of the United States, the parties claiming such lands shall forfeit all right thereto: *Provided,* said notices may be filed with the Surveyor-General, and to be noted by him on the township plats, until other arrangements shall have been made by law for that purpose.

SEC. 13. *And be it further enacted,* That the public lands in the Territory of Nebraska, to which the Indian title shall have been extinguished, shall constitute a new land district to be called the Omaha District; and the public lands in the Territory of Kansas, to which the Indian title shall have been extinguished, shall constitute a new land district, to be called the Pawnee District: the officers for each of which districts shall be established at such points as the President may deem expedient * * *.

F. ACT OF MARCH 3, 1865

The pertinent provisions of the act of March 3, 1865 (13 Stat. 541, 559), are:

All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock

on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

G. RAILROAD GRANT ACT OF JULY 27, 1866

The pertinent provisions of the act of July 27, 1866 (14 Stat. 292), are:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That John B. Brown, * * * and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Atlantic and Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, and construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River, thence to the town of Al-

buquerque, on the River Del Norte, and thence, by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be *be* selected by said company for crossing; thence by the most practicable and eligible route, to the Pacific. * * *

SEC. 2. *And be it further enacted,* That the right-of-way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine-shops, switches, sidetracks, turntables, and water stations; and the right-of-way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their

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voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

SEC. 3. *And be it further enacted,* That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other

lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided,* That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further,* That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof may be selected as above provided: *And provided further,* That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further,* That no money shall be drawn from the treasury of the United

States to aid in the construction of the said "Atlantic and Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

* * * * *

SEC. 6. *And be it further enacted,* That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or preemption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

SEC. 7. *And be it further enacted,* That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for

turn-outs, standing places for cars, depots, station houses, or any other structures required in the construction and working of said road. * * *

SEC. 8. *And be it further enacted,* That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted,* That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

* * * * *

SEC. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic

and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior.

* * * * *

SEC. 17. *And be it further enacted,* That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: *Provided,* That any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

H. ACT OF JULY 15, 1870

The pertinent provisions of the act of July 15, 1870 (16 Stat. 291, 304), are:

For surveying the public lands in Arizona, at rates not exceeding fifteen dollars

per lineal mile for standard lines, twelve dollars for township, and ten dollars for section lines, ten thousand dollars: *Provided,* That it shall be the duty of the surveyor-general of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory under the laws, usages, and customs of Spain and Mexico; and for this purpose he shall have all the powers conferred, and shall perform all the duties enjoined upon the surveyor-general of New Mexico by the eighth section of an act entitled "An act to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes," approved July twenty-second, eighteen hundred and fifty-four, and his report shall be laid before Congress for such action thereon as shall be deemed just and proper.

I. ACT OF FEBRUARY 20, 1925

The act of February 20, 1925 (43 Stat. 954), provides:

CHAP. 273. An Act To provide for exchanges of Government and privately owned lands in the Walapai Indian Reservation, Arizona.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the

Secretary of the Interior is hereby authorized, in his discretion, under rules and regulations to be prescribed by him, to accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation in Mohave and Coconino Counties, Arizona, and to permit lieu selections within the boundaries of the said reservation by those surrendering their rights so that the lands retained for Indian purposes may be consolidated and held in a solid area so far as may be possible: *Provided,* That the title or claim of any person or company who refuses to reconvey to the Government shall not be hereby affected.

II. ADMINISTRATIVE AND HISTORICAL MATERIAL TENDING TO SHOW THAT WALAPAI MAINTAINED PERMANENT SETTLEMENTS, PRACTICING AGRICULTURE, AND MAKING IMPROVEMENTS UPON THE LAND THEY OCCUPIED

A. CIVILIZED CHARACTER

"Many of the Mohaves and the Hualapais have hitherto been living quietly in the vicinity of Fort Mohave and on the bottom lands along the Colorado River, raising food for themselves and for sale, and procuring wood for the steamers plying on the river, transporting the supplies for the government, and the miners and other settlers in the Territory." [*Letter of Assistant Adjutant General John P. Sherburne to General Gregg,*

Commanding Headquarters, District of Prescott, dated May 18, 1867, at San Francisco.]

B. PERMANENCE OF ABODE

"*Villages*

"Possible village sites were definitely limited in number because of the prevailing scarcity of water. Villages must have been maintained in the same places for generations; there was no chance of moving the site at will.

"The village was made up of a number of families, each maintaining its own establishment. For each there was the winter house, occupied only during the winter; a brush shelter for summer; and another structure with a roof constructed to withstand the storms of fall. Since each family was composed of parents, children, and grandparents, there were frequently additional sleeping quarters for the children. In general, the family did not maintain its own sudatory or sweat-house, one sufficient for the whole village.

* * * * *

"The exceptions to this general rule of small villages seem invariably to have been located at sites of abundant water. Perhaps, then, it is fair to generalize and say that water, more than any other factor, dictated the distribution of population. * * * It is considered that prior to 1880 the distribution of the Walapai was much as it had been for the period previous to the coming

of the white men." [*F. B. Kniffen, Geography, in Walapai Ethnography (Memoirs of American Anthropological Ass'n, No. 42, 1935), pp. 29, 44–45.*]

"Land is claimed by families or settlements of related families. Relatives and friends visit for months at a time, using the land as though it were their own. Hunting privileges are seldom denied anyone; and, except in times of shortage, food gathering is permitted in exchange for nominal gifts. Permission is never asked by relatives or denied to friends, but with others there may be some question.

"Place of birth and early possession constituted the principal claims to land. These rights were inherited by members of one's family; but in case of no heirs, friends or neighbors laid claim. Mountains, hills, springs, and other natural features marked the boundaries; sometimes stakes and fences separated garden plots. The larger claims varied greatly in size, and much uninviting tribal land was unclaimed by any family or group. Instances are noted in which farm land was sold for a consideration." [*M. A. Mook, Property, in Walapai Ethnography, pp. 160–161.*]

"* * * A man claimed the land of his birthplace and all that was claimed by his parents. His birthplace was probably, in the majority of cases, the identical spot on which his father and grandfather had lived, so that from generation to generation holdings did not materially increase. * * *

"* * * Inheritance of lands seems to have existed, but it was so linked with the strong tradition for men to live and die in the locality in which they were born, that a strict case of land inheritance is difficult to distinguish, except in the case of farm land." [*G. MacGregor, Inheritance, in Walapai Ethnography, p. 163.*]

"*Birthplace*

"In regard to 123 Walapai born before 1900, we secured data as to the birthplace of the individual and of his father and mother.

	Place of birth same as—				
	Father's	Mother's	Both	Neither	Total
Born before 1870	18	12	14	7	51
Born 1870-79	27	8	6	11	52
Born 1880-89	9	4	1	6	20
Total	54	24	21	24	123
	In percentages				
Born before 1870	35	24	27	14	
Born 1870-79	52	15	12	21	
Born 1880-99	45	20	5	30	

"The two older groups represent essentially native conditions, undisturbed by railroad or reservation. It appears that three Walapai out of five were born at the village or spring where their fathers had been born. One-third of these marriages or one-fifth of the total were endogamous—husband and wife from the same settlement. Only once out of five times was the husband living with

his wife's kin when their children were born. The one-fifth of births away from both parents' homes may be accounted for by permanent shifts of residence, visits, and especially seasonal travel in search of food. That this proportion was no larger emphasizes the strength of locality attachment of the Walapai." [*F. B. Kniffen, S. Mekeel, and A. L. Kroeber, Vital Statistics, in Walapai Ethnography, pp. 292, 293.*] [1]

C. AGRICULTURE

"The Indians of this Territory may for all practicable purposes be fairly divided into two distinct Sections or societies by an imaginary line beginning at the Southern boundary of Arizona where the 111° of Long't intersects the same, thence North to the Gila River, thence by the Pima Reservation down said Gila to the 113th degree of Long't thence due North to the boundary of Utah.

[1] For additional evidence of permanency of Indian settlements see reports of destruction of Walapai rancherias by United States Army, contained in reports of Army officers dated November 10, 1867 (Walapai Papers, p. 48), December 7, 1867 (Walapai Papers, p. 48), January 17, 1868 (Walapai Papers, p. 50), January 20, 1868 (Walapai Papers, p. 53), and December 17, 1868 (Walapai Papers, pp. 80–82); report of Lt. Wilson, dated November 18, 1879 (Walapai Papers, pp. 126–127). References to "settlements" and "villages" are also found in the Report upon the Colorado River of the West, by Lt. Joseph C. Ives, under the Direction of the Office of Explorations and Surveys, by Order of the Secretary of War (Explorations in 1857 and 1858, Ch. VII, Walapai Papers, p. 16).

"All the Territory East of this line, excepting that of the Moqui Pueblos, is occupied by roving and robbing Indians—by the various tribes of the Apaches and a few unsubdued Navajoes, under Miquelito North of the little Colorado. These, like the Bedoins of the desert, are the terror of the surrounding Indians and the unceasing, implacable enemy to civilization, cruel, cowardly, and few in numbers, they have nevertheless successfully defied the advance of Spanish and Mexican power and civilization for centuries, and that of the United States since the acquisition of the Territory. Their very insignificant number, scattered over a vast mountainous country, has to them proved to be strength.

"The section West of this line is occupied by tribes either kindred in origin, or at least affiliated by intermarriage, frequent intercourse, barter, and similar agricultural pursuits.

"Of common (supposed Aztec) origin are the Pimas, Papagos, Moquis, Mohaves, & Yumas. Affiliated with them are the Maricopas, Hualapais, and Yavapais: of the Yavapais but little is known as yet; they seem to be few in numbers and vegetate in the deep and dismal, but sublime chasms and canyons of the Upper Colorado.

* * * * *

"The Yavapais and Hualapais infest the metalliferous mountain ranges and intervening plains for 100 miles East of the Section occupied by the former that is the section East of the middle Colo-

rado. They in certain seasons cultivate small spots of ground on the edges of the Colorado, or on those of a few little inland streams. If the grounds of the Papagoes cannot be relied upon for the annual crops on acc't of the uncertainty of rains, those belonging to the four tribes, last mentioned, share the same fate to a great extent, notwithstanding that they are situated on the margin of one of the great Rivers of America. The reason for this is to be looked for in the Physical and geological character of the Colorado Country." [*Report of Herman Ehrenburg, agent, dated January 11, 1866, to Commissioner of Indian Affairs.*]

"They [the Walapai, etc.] cultivate the bottom lands of the Colorado river, where an overflow affords sufficient moisture; the failure of an overflow, which sometimes happens, is considered a great calamity and breeds a famine." [*Report of Superintendent Charles D. Poston, in Annual Report of Commissioner of Indian Affairs,* 1864, p. 156.]

"The Walapai raised three colors or varieties of maize, four of beans, pumpkins (and squash?), sunflowers, watermelons and musk melons, peaches, and perhaps pears and apricots.

"Planting was without ceremony. A square foot or so of soil was loosened with a stick and a small wall was built around this to retain water from the irrigation ditch. In other places, where the ground was well watered before planting, the sower stuck his digging stick about six inches into the

ground and, making small holes "a foot and a half" apart, dropped five or six seeds in each. The holes were in rows "two or three feet" apart. Weeds were pulled out by hand.

"Ditches were run from the creek or spring into the fields, where they were either tapped by smaller ditches, or the water was allowed to run freely over the ground. This was done before planting and again when the corn had started to grow. The ditches were dug with a stick or a small hand shovel (spoon?) of split mountain sheep horn.

"It is said that formerly all planting and care of the fields was the work of men: the women harvested. But now the women help in the digging and cultivation. At harvest a farmer gave a feast to which his relatives and friends came. What was not eaten was dried and stored in skin bags and hung away for winter use.

"Some fields were inherited; others bought with buckskin or Navaho blankets.

"The fields, where not marked by the ditches, had corner stakes (?), or they were fenced with dead brush." [*G. MacGregor, Agriculture, in Walapai Ethnography, p. 58.*][2]

[2] Additional references to agriculture and particularly to the raising of corn, beans, and melons are contained in the following materials:

Letter dated April 10, 1885, at Hackberry, A. T., by Charles A. Harvey, Jr., Additional Farmer in Charge of Hualapai Indians, to Commissioner of Indian Affairs.

Letter of Jno. S. Mason, Colonel, 9th Infantry, Whipple Barracks, Prescott, Arizona, to the Assistant Adjutant Gen-

"25th: [March 1863] Left Camp at daylight, by 9 A. M. the country again widened out into a broad, well-watered, arable Valley, being a continuation of Hualapais Valley between the Hualapais Mountains on the West and the Aquarius Ranges on the East. Here the Indians had evidently lived in large numbers during the winter, and cultivated the land to a considerable extent. I destroyed by digging them up two Corn fields and one wheat field. They had evidently not been planted more than a week as the seeds had just began to Sprout. I destroyed seven recently abandoned Rancherias, containing 23 Wickiups." [*Report to Assistant Adjutant General J. P. Sherburne of destruction of Walapai rancherias, dated April 21, 1868. W. P., p. 70.*]

"The Rancheria contained, which we captured or destroyed, One Horse, 50 Buckskins, 12 Bows, and over 100 arrows, 1 Pistol, Powder, and Bullets, 1 axe, 200 Buckets, containing provisions, 25 pairs moccasins, 3 saddles, 12 water jugs, number of Bags containing seeds, corn, Pinion nuts, with several hundred lbs. prepared muscal, together with the most complete lot of minor articles, very valu-

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eral, Department of Arizona, Whipple Barracks, Arizona, dated September 7, 1886.

Letter of Captain F. E. Pierce to Assistant Adjutant General, Department of Arizona, dated September 28, 1884 (W. P., p. 161).

able to them, that I have ever seen in an Indian camp." [*Report to Assistant Adjutant General J. P. Sherburne of destruction of Walapai rancherias, dated December 17, 1868. W. P., p. 82.*]

"The Hualapais are located chiefly in the Cerbat and Aquarius ranges and on the eastern slope of the Black Mountains, and they range through Hualapais, Yampai, and Sacramento Valleys from Williams Fork on the south to Diamond River on the north.

"They at present cultivate but little, living principally by the chase and such roots, acorns, seeds, &c as they are able to gather. They are very poor at present and have but little stock or property, as the hot pursuit of the troops frequently caused them to abandon it in order to consult their own safety and that of their families." [*Report of General Thomas C. Devin, dated April 1869. W. P., p. 91.*] [3]

E. USE OF WATER

"Referring to my letter of the 19th instant, in relation to the Hualpai Indians in Arizona, I have to state, in addition to the above-mentioned report, that these Indians are not on any reservation, nor in charge of an Agent of this Office, but are living

[3] For additional material on the destruction of Walapai rancherias, the driving out of Indian farmers, and the destruction of corn fields, wheat fields, and the seizure of seed, see p. 27, fn. 1, *supra*.

at or near Hackberry, Arizona, without being under control of the Department.

"With reference to railroad parties appropriating water to the injury of these Indians, I have to say that it is a well settled principle of law that the first occupant of running water, for a beneficial purpose has a good title to it, and that neither the owner of the land below can dam or pen back the water, nor the owner of the land above divert it to his prejudice.

"In this, as in other cases of injuries to real property, possession is a good title against a wrongdoer. (Angell on Water courses 226.)

"It is true that these Indians have no title to the lands occupied by them, but no doubt they have been in possession of them for a great many years, and the right to the use of the water sufficient for their necessities would inure to them by right of prescription.

"I would therefore suggest that the Hon. Secretary of War be requested to direct the proper military officer to notify the railroad parties referred to, that the Indians have the prior right to the water, and that it must not be diverted to the injury of the Indians." [*Letter of Commissioner of Indian Affairs to Secretary of Interior dated July 22, 1881.*]

F. FIXED LOCATION OF RANCHERIAS

"Boundaries and Neighbors

"The centers of population, the largest villages, lay fairly close to the center of Walapai territory. On all sides there was a considerable strip of territory before the villages of other tribes were reached. The sites favorable to permanent habitation lay fairly bunched, surrounded by country decidedly inferior in resource.

* * * * *

"A brief description of each of the seven divisions may serve to bring out certain of their characteristics not indicated on the map.

"*Mata'va-kopai* (*north people*).—This is a name applying to the group holding the northwestern division of Walapai territory. The principal village site was Hadu'ba (Clay springs), which lies at the top of the escarpment formed by the Grand Wash cliffs. All the permanent villages lay along the edge of the escarpment. There were large perennial springs and easily defensible sites.

* * * * *

"This group controlled one of the few sites in Walapai territory where agriculture could be, and was, carried on. This site lay in the canyon floor at Matuwi'tite or Matewi'tide, the "Meriwitica" of the maps.

"*Soto'ive-kopai* (*west people*).—This group held the Cerbat mountains, and the country west to the

Colorado. Hamte' was the principal village, near a spring at the eastern base of the mountains. Most of the other larger villages lay to the north or south of Hamte' in similar situations. Several villages of lesser importance were established to the west across the Detrital-Sacramento valley, along the crest and eastern margin of the Black range.

* * * * *

"*Ko'o'u-kopai* (*mesa people*).—The situation of this group was similar to the first. The principal villages, of which Hel (Milkweed springs) was the largest, lay on the plateau where it slopes from the escarpment toward the Colorado. Included in this group were several outlying villages, not on the plateau, but situated along Truxton canyon or in the hills which form the divide between the Sandy and Hualpai valley. Most of the sites were determined by springs which lie at the heads of canyons leading to the Colorado.

* * * * *

"*Nyav-kopai* (*east people*).—* * * One main village, Haketakwi'va, lay near the present town of Peach springs, the other, Haksa' (Pine springs), on the plateau above the Aubrey cliffs.

* * * * *

"*Hakia'tce-pai* (?) *or Talta'l-kuwa* (*cane?*).—This group inhabited a half-dozen villages clustered about the Mohon mountains. Hakia-tce was the principal village; Wi-ka-tava and Tha'va-

ka-lavala'va were next in importance. The others were all much smaller.

* * * * *

"*Kwe'va-kopai* (*south people*).—Of all the Walapai this was the only group which dwelt out in the valley flat away from the mountains. Hapu'k, the principal settlement, was strung along the perennial portion of the Big Sandy, from Wickiup down to a point about two miles north of Signal. All the other settlements were located about springs, and were much smaller in size.

* * * * *

"At the present time the Walapai of the Sandy practice a primitive agriculture. In Patches, conditions appear to be quite favorable. There is sufficient water; the soil tends to a sandy character, easily workable; irrigation involves no difficult engineering problems. Reports vary as to the time of introduction of agriculture into the Sandy area. Agriculture could not have been the dominant economic pursuit, for if it had been there would have been more agreement among the several informants." [*F. B. Kniffen, Geography, in Walapai Ethnography, pp. 38–43.*]

"I sent for Mr. Charles Spencer, who from his long residence amongst these Indians speaks their language and knows their habits and wants, and learned from him that the Hualpais are divided into some twenty-six bands. Each band occupies a separate section of country north of and both

east and west of Prescott, where they have lived for many years, with the exception of some two hundred and fifty, who reside on the present reservation during the summer months where they can raise enough corn, beans, and melons for immediate consumption."[4] [*Letter of Jno. S. Mason, Colonel, 9th Infantry, Whipple Barracks, Prescott, Arizona, to the Assistant Adjutant General, Department of Arizona, Whipple Barracks, Arizona, dated September 7, 1886.*]

III. ADMINISTRATIVE AND HISTORICAL MATERIAL TENDING TO SHOW THAT THE CLAIM OF THE WALAPAI TO POSSESSION OF LANDS INVOLVED IN THIS SUIT WAS A MATTER OF PUBLIC KNOWLEDGE

CONTRACT BETWEEN WALAPAI INDIANS AND MOHAVE AND PRESCOTT TOLL ROAD COMPANY, JULY 15, 1865

"This Indenture, made the Fifteenth day of July in the year of our Lord One Thousand Eight hundred and Sixty-five, Between the Tribe of Indians called the Wallipies, represented by their Chiefs Wauba Yuma, Hitchie Hitchie and Sherum, parties of the first part, and the Mohave and Prescott Toll Road Company of Arizona Territory parties of the second part, Witnesseth that the said parties of the first part for and in consideration of a certain lot of Merchandise of the value of One Hundred and fifty Dollars to them

[4] To the effect that white settlements in 1873 were springing up around the original Indian settlements, see Annual Report of Commissioner of Indian Affairs, for 1873, at p. 284.

in hand paid, the receipt whereof is hereby acknowledged, have this day granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said parties of the second part, the right of travelling through their country, the same being the road as located and worked by the said parties of the second part and now travelled by the public, commencing at the Town of Hardyville and running to the line of the Wallipi Country near the Juniper Pass. The conditions of this contract is such that the said Toll Road Company and their successors shall have the right to maintain a road and that the public shall travel over the said road free from molestation by the Indians and that said parties of the Second part shall have the right to build houses at the several watering places on the road and hold sufficient ground for stations and shall have the right to fence and improve said ground and said parties of the second part shall have the right to graze their stock along the road and also to cut Timber, use water and make use of whatever is necessary for the convenience of the travelling public. Whenever Stock strays the parties of the first part if possible are to find and return said stock and shall receive therefor One dollar per head or its equivalent as they may choose. In Witness Whereof, said parties of the first and second part have hereunto set their hands and seals the day and year first above written. This instrument is

made through the advice of G. W. Leihy, Superintendent of Indian Affairs in Arizona.

"WAUBA (his x mark) YUMA. (Seal)
"HITCHIE (his x mark) HITCHIE. (Seal)
"SHERUM (his x mark). (Seal)

"WM. H. HARDY,
"Acting Agent for the Mohave and Prescott Toll Road Company."

[*W. P., pp. 34–35.*]

"The areas inhabited by, and known as the country of, the Shoshones, Pah-Utes, Chemehuevis, Utes, Mohaves, Seviches, Hualapais, Apache-Mojaves, Cosninas, Apache, (Tontos, Pinals, Coyoteros and Arivapas) &c., have been pretty accurately determined, and will be mapped out." [*Preliminary Report: Explorations in Nevada and Arizona, War Department, 1871, by Daniel W. Lockwood, First Lieutenant of Engineers, approved by George M. Wheeler, Corps of Engineers, at page 27.*]

"The following remarks are submitted as the result of my observations and inquiries among the Hualapai Indians.

"Their Country is bounded on the East by Cataract Creek, on the North and West by the Colorado river, and on the South by the Big Sandy and Bill Williams Fork.

"Within these limits, however, is included the Mojave Country along the Colorado river from Hardyville down, which the Hualapais don't

claim." [*Letter of Lieutenant George S. Wilson, to Assistant Adjutant General, Department of Arizona, dated November 18, 1879.* W. P., p. 126.]

"* * * for most of the Walapai boundary the line might well represent the areal limit of utilization by the neighboring tribes.

"The steep-walled, forbidding gorge of the Colorado formed the boundary to north and west, toward the Paiute. At the point where the Colorado enters Mohave valley the boundary between Walapai and Mohave fell back to the first range, east of the river. The Yavapai held Bill Williams fork, and its continuation, the Santa Maria, while to the north the boundary passed through the dry plain between the first and second escarpments of the plateau. The easternmost village of the Walapai lay a short distance east of the Aubrey cliffs, marking the approximate boundary between Walapai and Havasupai." [*F. B. Kniffen, Geography, in Walapai Ethnography, p. 38.*]

"A diversity of opinion exists among the various tribes of the Indian Territory by reason of the projected roads north and south and east and west through that Territory. Other roads in the South, aiming to reach the Pacific, will, of necessity, pass through immense tracts of Indian country, or country claimed by them." [*Annual Report of Commissioner of Indian Affairs, 1870, pp. 10–11.*]

"* * * I can but express what is so apparent, and what has heretofore been seen and recommended in communications to and from this office, the propriety and necessity of there being some treaty arrangements entered into with tribes in New Mexico, Arizona, Nevada, and Washington Territories, having no treaty relations with the government especially with those tribes inhabiting or claiming rich agricultural districts or mining regions, in order that their rights may be determined and secured, peace relations established, and proper measures adopted for their civilization, and, at the same time, the rights of settlers protected, and desirable wastes of country opened for occupancy and improvement by citizens. The tribes in these Territories, as well as others, have long roamed free and uncontrolled over the countries they occupy, which they claim as their own, and it is not surprising they regard with jealousy and bitterness of spirit the encroachments of the whites, who, in many instances, not only ignore their rights but treat them with contempt, and despoil them of life and property." [*Annual Report of Commissioner of Indian Affairs, 1868, p. 6.*]

"The Huallapais, a tribe whose country lies East, North, and South of the Mojave and Prescott road, and who have given the whites a great deal of trouble for the past three years, are now inclined to be peaceable." [*Letter of Brevet Major*

General Frank Wheaton to Brevet Colonel George L. Andrews, Superintendent of Indian Affairs for Arizona, dated December 8, 1869, Indian Office File.[5]]

IV. ADMINISTRATIVE AND HISTORICAL MATERIAL TENDING TO SHOW THAT ONLY A PART OF THE WALAPAI TRIBE WAS TEMPORARILY REMOVED TO THE COLORADO RIVER RESERVATION

A. ABSENCE OF WALAPAI FROM RESERVATION PRIOR TO 1874

"* * * At present there are no Indians on the reservation." [*Letter of John Feudge, Special U. S. Indian Agent, Colorado River Indians, to Commissioner of Indian Affairs, dated April 14, 1866, Indian Office File.*]

"It is much to be regretted that Congress has not made the necessary appropriations for the Indian service in Arizona, according to the estimates prepared by this Office, although every possible effort was made by the Department, in repeated communications upon the subject. But such being the case, and the whole appropriation for the current year being limited to $25,000, you will

[5] Other references to the Walapai country are to be found in the report of Major J. M. Schofield to the Assistant Adjutant General, dated September 20, 1875, contained in the Report of the Secretary of War for 1875, at pp. 118 to 121; the report of Colonel August V. Kautz to the Assistant Adjutant General, dated August 31, 1875, *ibid.*, p. 131; the letter of Inspector General James A. Hardie to Major General J. M. Schofield, dated May 8, 1875; report of Colonel O. B. Willcox to Assistant Adjutant General, dated September 13, 1878, in Report of Secretary of War for 1878, p. 194.

perceive the necessity of limiting your expenditures accordingly. All projects, therefore, of concentrating the Indians upon reservations, which involve any expenditure beyond the means at the disposal of the Department, must be avoided; and the same caution must be exercised in regard to all other expenses of the service." [*Letter of Commissioner of Indian Affairs to Geo. W. Leihy, Superintendent, Indian Affairs, La Paz, Arizona, dated August 18, 1866, Indian Office File.*]

"*Arizona.*—* * * Plans to colonize the tribes known as the River Indians, the Yavapais, Hualapais, &c., upon a reservation on the Colorado river, set apart for them by Congress two years ago, have been considered and presented to the department, but for want of necessary funds nothing of a permanent character has been done. * * *" [*Letter of Assistant Adjutant General John P. Sherburne to Brevet Brigadier General J. I. Gregg, dated May 18, 1867, Indian Office File.*]

"*Colorado River reservation,* selected in 1864, stretching on the river from Corner Rock to Halfway Bend, is estimated to contain seventy-five thousand acres of public domain, and upon which it was proposed to colonize about ten thousand Indians of various tribes * * *. The great desideratum, water for irrigating the land, when not supplied by an overflow of the river, was needed. This is sought to be furnished by means

of an acequia or canal, which has not yet been completed, either because of its magnitude and unavoidable obstacles, or want of funds to carry on the work continuously for any great length of time. * * * Superintendent George L. Andrews, Brevet Colonel, United States Army, reports the condition of affairs to be unfavorable at the time of his visit to the reservation lately; only about eight hundred Mohaves were there, and but forty acres in cultivation. * * * He is of the opinion that when the canal is completed many who are now outside will go upon the reservation. There are four tribes in the agency, inhabiting the country along the Colorado River from Fort Yuma to the northern boundary of the Territory: The Yumas, numbering two thousand; Yavapais or Apache Mohaves, two thousand; Mohaves four thousand; and Hualapais, fifteen thousand; all of whom are now peaceable." [*From Annual Report of Commissioner of Indian Affairs, 1869, p. 19.*]

"I have the honor to report, there is nothing on file in this office or in the office of the Agent relating to the establishment of the Colorado River Reservation." [*Letter from Superintendent of Indian Affairs for Arizona, Geo. S. Andrews, to Commissioner of Indian Affairs, dated May 11, 1870, Indian Office File.*][6]

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[6] And see receipts for distribution of goods on the Colorado River Reservation, dated March 31, 1866, and January 12, 1868, signed by Indians other than Walapais (Indian Office File). See also letter of Indian Agent Helenus Dodt,

B. INCOMPLETENESS OF FORCED REMOVAL

"Since my last annual report the Hualpais have been placed under my charge. This people range through the country north and east of the Mohaves. Their strength has been variously estimated at from 1,200 to 1,600, but the number fed at Camp Beales Springs, where they have been collected during the year past, has not averaged more than 600. It is my intention to remove them to this reservation in October next, where they can be fed with less expense to the Government." [*Report of J. A. Tonner, Indian Agent for Colorado River Reservation, dated August 30, 1873, in Annual Report of Commissioner of Indian Affairs, 1873, p. 284.*][7]

"The Hualpai Indians, numbering 580, came to the reserve in the spring, escorted by one white man. * * *" [*Annual Report of Commissioner of Indian Affairs, 1874, p. 289.*]

Indian Agent for the Colorado River Reservation, to G. L. Andrews, Superintendent of Indian Affairs for Arizona, dated October 18, 1869, indicating presence of Mohave and Yavapai Indians on Colorado River Reservation, in Indian Office File.

[7] Other estimates of the Walapai population are: 1,500 (report of John Feudge, Special U. S. Indian Agent, Colorado River Agency, August 1, 1869, to Commissioner; Annual Report of Commissioner of Indian Affairs, 1869, p. 213); 1,500 or 2,000 (letter of Charles D. Poston, Indian Agent, to Commissioner of Indian Affairs, April 10, 1863, in Indian Office File); 1,500 in 1867 (letter of Lieutenant Colonel William Redwood Price to Assistant Adjutant General, Department of Arizona, dated July 1, 1881, in Indian Office File).

"That it is premature to claim this removal as a decided success, it is only necessary to review the history of the removal of the Hualpai Indians. It will be remembered that these Indians were forced to go to the Colorado reservation, against the recommendation and advice of General Crook, by the troops. They went, but made conditions that they should be separated from the Mohave Indians and should have Captain Byrne, with his company, stationed with them to protect them and supervise the issue of rations to them. This was an objectionable feature to the Indian agent in charge; but they were, nevertheless, located on the southern boundary of the reservation at La Paz, and remained there a little over one year under special arrangements made between General Crook and the agent. On the day that General Crook left these headquarters, I received a communication from the commanding officer at La Paz informing me that the issues had been discontinued by the agent at that point, and that the Indians had been informed that they must come to the agency, forty miles above, for their rations; that the Indians had gone, and that the troops were no longer needed at La Paz. This movement was a violation of a verbal agreement between General Crook, the agent, and the Indians.

"On the 21st of April I received a dispatch from Indian Agent Tonner, of the Colorado reservation,

informing me that the Hualpai Indians had left their reservation and gone in the direction of Beale's Springs, their old home, and requesting that I send cavalry in pursuit. Owing to the movements of the Fifth Cavalry, it was not convenient to pursue them, even had I thought such a course advisable. Soon after, Agent Tonner arrived in person, and, upon a consultation with him, I learned that the Indians had left in a peaceable manner, had disclaimed all hostile intentions, and that they were accessible to communication by the Indian Department without danger. I suggested that a display of troops would drive the Indians to their strongholds, and perhaps endanger the lives of the inhabitants that were mining or had settled in the Hualpai country, and that his best plan was to interview them and ascertain their wishes, and represent the case to his Department. This was agreed to, and he withdrew his application for troops. The matter was fully reported, at the time, through the regular channels, to the War Department.

"The Hualpais have remained friendly, although many miners and settlers are occupying their country, with whom they are in daily contact. I do not apprehend that this will last, and suggest that some portion of their own country on its northern boundary, remote from the settled portions, be set aside for them as their reservation. * * *" [*Report of Colonel August V.*

Kautz, commanding officer of the Upper Colorado District, to Assistant Adjutant General, dated August 31, 1875. Annual Report of Secretary of War, 1875, p. 131. W. P., p. 113.]

"* * * The Hualpais are mountain Indians and will not live in the torrid valley of the Rio Colorado below Fort Mojave, where the Interior Department once placed them. On the 4th of July, 1873, at 5 P. M., I observed the thermometer; it indicated 118° F. in the shade and 148° in the sun after an exposure of two minutes. The Hualpais can't stand such heat and will not." [*Report of John G. Bourke, Captain, 3d Cavalry, on Hualpai Reservation, May 22, 1886.* W. P., p. 152.]

"For several years the Hualapais Indians roamed unmolested among the mountains of Northwestern Arizona, in the vicinity of Camp Beale Springs, and subsisted themselves in the Indian way. But in 1873, when it was represented that they were on one of the principal lines of travel, and that mining camps were springing up all around them, it was recommended, by both civil and military officers, that they be removed from that section and located upon some reservation. Accordingly, in the spring of 1874, 580 of them were removed to the Colorado River Reserve, and there regularly rationed. Partly on account of their dissatisfaction with the location, and partly owing to their unwillingness to submit to the require-

ment that they should labor for a portion of the ration, they left the reservation the following spring, and returned to their old haunts; and the agent reported that, in consultation with the commanding officer of the department, it had been decided to allow them to remain there during good behavior." [*Annual Report of Commissioner of Indian Affairs, 1881, p. XLV.* W. P., p. 131.]

"The Hualapais remain in their ancient country, which, however, is being settled by the whites, miners, and ranchmen, among whom the feeling is growing that these Indians should be removed." [*Report of Colonel O. B. Willcox to Assistant Adjutant General, dated September 13, 1878. Annual Report of Secretary of War, 1878, p. 194.* W. P., p. 117.]

V. ADMINISTRATIVE AND HISTORICAL MATERIAL TENDING TO SHOW THAT ONLY A PART OF THE WALAPAI TRIBE HAS EVER INHABITED THE WALAPAI RESERVATION

"In 1884, Gen. Crook reported: 'The reservation now set apart for them is not adapted to their needs, etc.'

* * * * *

"In 1888 Lieut. Col. C. M. Brayton reported:

'I consider the present Hualapai reservation entirely valueless as a home for Indians, a place where white men cannot earn a living and certainly Indians cannot. There are but few Indians living on the reservation.'"

* * * * *

[*Report of Supt. S. M. McCowan to Commissioner of Indian Affairs, dated November 22, 1895.*]

"From 'Peach Springs' I went to Kingman at or near which point the majority of the Hualpai tribe lives." [*Letter dated December 9, 1889, at Colton, California, from Special Indian Agent Frank D. Lewis, to Commissioner of Indian Affairs. Indian Office Archives, E 36036–1889.*]

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[8] And note "Memorandum of number of Hualpai Indians, names of places where they live, and how employed, with names of chiefs and number in each band" submitted by Lieut. Col. Brayton on June 8, 1888 (Walapai Papers, pp. 165–168), identifying 646 Walapai Indians, of whom 553 were ascertained to live outside the reservation. And see estimate of Col. J. S. Mason, at pp. 36–37, *supra*.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE GOVERNMENT OF THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 23

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE GOVERNMENT OF THE UNITED STATES

In the lower courts the United States has urged on behalf of the Walapai that, whether or not the tribe had a compensable right of occupancy or possession against the United States, the railroad, as a grantee without sovereign rights or political powers, took subject to the Walapai's right of occupancy. *Beecher* v. *Wetherby*, 95 U. S. 517, 525–526; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55. The position of the United States as guardian of the Walapai and as a defendant in other cases

against Indian claims was, therefore, wholly consistent. The Solicitor General was of the view that this position was entirely sound, but yet felt that the Walapai should be free, if their counsel so chose, to make the broader argument that their rights of occupancy ran against the United States. Accordingly, he authorized the Solicitor of the Department of the Interior to present the case to this Court.[1]

The brief filed on behalf of the petitioner (pp. 15–17, 36, 40, 41) expressly disavows any challenge to the conclusion, several times sustained by the Court of Claims, that in the absence of treaty recognition or confirmation mere aboriginal possession will not ground a right of occupancy or claim for compensation against the United States. *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, 597–603, certiorari denied, 295 U. S. 755; *Coos Bay Indian Tribe, et al.* v. *United States*, 87 C. Cls. 143, 152–153, certiorari denied, 306 U. S. 653; *The Wichita Indians, et al.* v. *United States*,

[1] Respondent seems to read this authorization as evidence of a difference between the Departments of Justice and Interior, or between the United States and the Walapai (Br. 8–9; see also brief of *amici curiae*, p. 2). This emphatically is not the case. Since the broader argument, as to rights of occupancy against the United States is not advanced by petitioner, there is no basis whatever for suggesting that petitioner's argument is on behalf of the Walapai in contrast to the United States, or that the Solicitor of the Department of the Interior is acting "as advocate for the Indians" rather than "as counsel for the Government."

89 C. Cls. 378, 416. There is, therefore, no occasion for the United States to file a brief to protect its interest in avoiding the liability, which is large under existing jurisdictional acts and might be staggering under possible future acts, which would result from a reversal of the rule established in the Court of Claims.

In cases pending in the Court of Claims (*Northwestern Bands of Shoshone Indians* v. *United States* and *The Indians of California* v. *United States*, Nos. M–107 and K–344, respectively), the Government has also contended that the Spanish and Mexican law accorded no rights to the "wild" tribes inhabiting the lands of the Mexican cession against the sovereign, although there may have been an occasional recognition of their rights as a matter of political exigency. In the present case petitioner's brief, while contending that the Walapai were not a "wild" tribe, also contends that the "wild" tribes enjoyed certain rights of occupancy under Spanish and Mexican law against others than the sovereign. Since this point is fully treated in the briefs both of petitioner (pp. 61–79) and of respondent (Part 1, pp. 72–75, Part 2, pp. 1–13), additional discussion is not required.

Respectfully,

CHARLES FAHY,
Acting Solicitor General.

OCTOBER 1941.

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REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

STATEMENT OF ISSUES

A considerable part of the respondent's brief is directed to meeting arguments that the Government has not made in this case and does not intend to make. It may assist the Court in clarifying the real issues in the case to note briefly those arguments which the respondent has erroneously ascribed to the Government and which

the Government does not advance and does not need to advance.

The respondent's brief misconceives in at least six respects what it is that the Government seeks to, or needs to, demonstrate in order to prevail in this appeal.

(1) *The Government does not seek or need to show that it was without power in 1866 to confer upon the railroad the title to all lands in controversy.*

Respondent's suggestion that the Government is attempting to impugn its own power to convey title (Respondent's brief, pt. 1, pp. 11, 25, 106) is without basis. That the Government had title to these lands and the power to convey such title to the respondent's predecessor is not in dispute (Petitioner's main brief, pp. 5–6). Totally irrelevant, therefore, is the argument of the respondent which demonstrates, by the marshaling of various reports, that the lands here in litigation were, at the time of the 1866 Granting Act, public lands, the title thereto being vested in the United States regardless of any Indian possessory claims (Respondent's brief, pt. 1, pp. 15, 41–46, 56, 60, 90–95).

(2) *The Government does not seek or need to deny that the railroad has title to the lands in dispute.*

Respondent's assertion that the Government is denying the title of the railroad (Respondent's

brief, pt. 1, p. 60) and seeking to assert that title to these lands is vested in the Indians or in the United States (*ibid.*, pp. 11, 25, 45) is without merit. Petitioner has conceded that title to the lands in dispute was vested in the respondent by the 1866 Granting Act (Petitioner's main brief, pp. 5–6, 13). Entirely immaterial, therefore, to any point in dispute is respondent's detailed argument that Congress has always had, and sometimes asserted, the power to convey to third parties title to public lands occupied by Indians (Respondent's brief, pt. 1, pp. 44–45, 60, 68–71); that the 1866 Granting Act, construed in the light of its legislative history, transferred title to the grant lands to the railroad (*ibid.*, pp. 13–23); that the Secretary of the Interior issued patents covering some of these lands to the railroad and duly found that title to some of these lands had been granted by the 1866 act (*ibid.*, pp. 4, 68–71, 103); and that a similar assumption as to the conveyance of title to these lands was made by Congress and the courts on various occasions (*ibid.*, pp. 5, 13–23, 60–68, Appendix, pp. 100–106). Obviously the transfer of legal title tells us nothing at all concerning rights of tenancy or occupancy at the time of transfer, since it has long been recognized that Indian occupancy right (sometimes characterized as "Indian title"), is not incompatible with ownership of the land in fee by a government or a private party.

(3) *The Government does not seek or need to show that Walapai occupancy rights are valid against the United States.*

The contention of the respondent that the Government seeks in this suit to establish in the Walapai Tribe rights against the United States (Respondent's brief, pt. 1, pp. 8, 11, 25, 27, 76, 106) is a misrepresentation of the Government's position. The Government has expressly noted that the question of Indian rights against the United States is an issue "never properly involved in the case at bar" (Petitioner's main brief, p. 9), and has carefully noted that the issue actually involved in this case is whether the Walapai Tribe enjoys a right of possession against "parties other than the United States" (Petitioner's main brief, pp. 15, 16, 29, 36, 67). Indeed, the Government has gone further and in its main brief has expressly recognized the *power* of the sovereign to extinguish Indian possessory rights (main brief, p. 67), and has noted that such rights are "subject only to divestiture by the Government itself" (*ibid.*, p. 72). The important question in the case is whether this power was exercised (*ibid.*, p. 12). Entirely immaterial, therefore, are those portions of respondent's brief which seek to demonstrate that Congress did not intend, by the Granting Act, to "limit its otherwise sovereign power" (Respondent's brief, pt. 1, pp. 23–28), that the Constitution confers such power upon Congress

(*ibid.*, pp. 28–30), that the Walapai Indians have no such vested rights as would preclude the exercise of such power by Congress (*ibid.*, pp. 8–9, 30–36), and that the power of Congress to terminate Indian occupancy rights remained unimpaired (as a matter of domestic law, although not of international obligation) by the Treaty of Guadalupe Hidalgo (*ibid.*, pp. 38–39, 72–73), or by any other act or treaty (*ibid.*, pp. 44, 67, 77–78).

(4) *The Government does not seek or need to show that the Walapai Tribe had title to lands under Spanish or Mexican law or that Spain or Mexico were without right to extinguish Indian possession.*

Respondent assumes that the Government has attempted to establish that the Walapai Tribe had, under Spanish and Mexican law, either a perfect title or a possessory right beyond the power of the sovereign to terminate (Respondent's brief, pt. 1, p. 41, pt. 2, pp. 8–11). No such contention has been made by the Government and, indeed, the Government has expressly conceded that Spanish law recognized "the *power* of the sovereign to extinguish Indian possessory rights" (main brief, p. 67) and noted: "The fact that the Spanish Crown might terminate such rights, with or without compensation, does not disprove the existence of the right." (*Ibid.*, p. 71.) Immaterial, therefore, to any issue in this case is the persuasive argument of the respondent that title to lands

occupied by Indians was claimed by the Spanish Crown, in the absence of some royal grant or recognition of Indian ownership (Respondent's brief, pt. 2, pp. 3, 5, 6, 7); that "The fact of possession by an Indian tribe was no basis of a title" (*ibid.*, p. 13); that although Indians had legal rights (*ibid.*, p. 2), "they had no rights which could be urged against the Crown or its officers" (*ibid.*, p. 11); and, finally, that Christian sovereigns, according to certain Spanish authorities, had the power to confiscate the property of Indians who were "unbelievers" (*ibid.*, p. 9).

All these points, for purposes of this case, petitioner concedes. All that petitioner is concerned to maintain, and all that petitioner has asserted in its main brief (as distinguished from what some of the cited original authorities assert), is that a right of occupancy valid against parties *other than the sovereign*, existed, under Spanish and Mexican law, in Indians who maintained continuous possession of an area from time immemorial. In other words, the Spanish and Mexican law accorded to Indian occupancy the same kind of recognition that the law of the United States later accorded (Petitioner's main brief, pp. 61, 67, 71–72).

The respondent admits these contentions of the petitioner. It admits, in effect, that the claim of Spanish sovereignty did not, *ipso facto*, terminate prior "personal rights" of Indians (Respondent's brief, pt. 2, p. 4); that organized Indian com-

munities could acquire perfect property rights by prescription (pp. 7–8); that "property rights" might be founded, in the absence of specific grant, upon a law or decree confirming rights claimed before[1] (*ibid.*, p. 5); and that under Mexican law grants to "lands of which native Indians are in possession, when they lack a title granted by competent authority," have been construed in such a way as "to avoid dispossessing them" (*ibid.*, p. 13).[2]

So far as Spanish and Mexican law has any application to this case, petitioner's argument is a purely negative one: that Spanish and Mexican law was not different from the law of the United States in any respect which would compel discriminatory treatment against Indians of the Mexican Cession. Such discriminatory treatment is insisted upon in the opinion of the Circuit Court of Appeals below (R. 206–210). To the extent that respondent now concedes (Respondent's brief, pt. 1, pp. 12, 72) that no such difference is to be found, this issue has now been eliminated from the case, and if the decision of the Circuit Court of Appeals is to be

[1] Such laws and decrees recognizing Indian possessory rights in described situations are cited in petitioner's main brief at pp. 66, 68, 69, and 70.

[2] Noting these concessions, it becomes unnecessary to deal with minor points of difference between the view of the respondent and that maintained by Chief Justice Marshall and many later justices of this Court (Petitioner's main brief, pp. 62, 72 76) as to the legal character of those rights of occupancy or possession which, as respondent concedes, were effectually recognized by Spain and Mexico.

affirmed, it must be for some reason other than that which the Circuit Court itself asserted. The only such reason put forward by the respondent is the argument that throughout the United States, outside of the Mexican Cession as well as within that area, there are no Indian rights based on aboriginal occupancy (*ibid.*, pp. 75–103). This argument petitioner elsewhere meets on the merits.

(5) *The Government does not seek or need to show any rights against grantees of the United States other than the railroad.*

Respondent asserts that the Government seeks in this action to establish Indian ownership to one-eighth of Arizona (Respondent's brief, pt. 1, p. 2) or to the entire State (*ibid.*, p. 23), including those portions of Arizona occupied by cities, settlers and purchasers. No such contention has been made by the Government. If the complaint contains some assertions broader than the issues of the case, this may be ignored as mere surplusage. The suit is brought against the railroad and the only lands in issue are railroad grant lands within a specified area which are actually occupied by Walapai Indians. The position of the Government with respect to these lands is based upon the particular language of the grant and does not apply to lands granted under different statutes. The complaint itself expressly notes, even with respect to railroad grant acts, that the Indians make no

claim to lands which "have been subsequently assigned to innocent holders and assignees" (R. 19). If, by this action or by any argument advanced in support of the Government's position, the Government were actually seeking to establish a possessory right to all of Arizona or to one-eighth of Arizona in the Walapai Tribe, there would be a good deal of persuasiveness in the detailed argument of the respondent that any such attempt would run counter to the general policy of the United States as expressed in various acts of Congress and reports of administrators. That, however, is not the issue before this Court and the arguments of the respondent's brief bearing upon that issue are beside the point, as are the fears expressed in the brief filed for the State of Arizona and certain counties thereof as *amici curiae* in this case (at pp. 1–2, 4–7).

(6) *The Government does not seek or need to show that it will be able to sustain the allegations of the complaint as to all the lands in litigation.*

Respondent assumes that the Government must be in a position to prove Walapai occupancy right against the railroad with respect to all the lands involved in this litigation or else must utterly fail (Respondent's brief, pt. 1, pp. 26, 62). It over-

looks the obvious alternative that the Government may be able to prove Walapai possessory right in some greater or smaller part of the lands in litigation. This possibility has repeatedly been noted by the Government (Petitioner's main brief, pp. 15, 103–104; petitioner's brief on application for writ of certiorari, p. 2; petitioner's reply brief on application for writ of certiorari, p. 12).[4] This all-or-none fallacy of the respondent vitiates the argument that much legislation and administration directed to the lands described in the complaint is inconsistent with the allegation of the complaint that *all* of these lands are subject to Walapai possessory rights (Respondent's brief, pt. 1, pp. 18–28, 38–71).

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[4] Thus petitioner's reply brief in support of petition for certiorari declared: "Repeatedly the respondent's brief (pp. 2, 11–14) and the opinion of the court below (R. 208–209) confuse the issue presented by the pleadings by arguing that Congress could not have intended to withhold from disposition the whole of the extensive area designated in the second cause of action of the complaint, and inferring that therefore there are *no* Indian rights in any part of the area. This argument is a *non sequitur*. Petitioner seeks an opportunity to establish some possessory rights in this area. Even if the petitioner, on the trial, should succeed in proving permanent possession and possessory rights only in those villages or settlements, outside the reservation, which the Walapai have occupied from time immemorial and still occupy, the petitioner would be entitled to a substantial judgment in its favor. Dismissal of the complaint precludes any such proof."

ARGUMENT

POINT 1

THE RAILROAD RECEIVED NO RIGHT TO IMMEDIATE POSSESSION, UNDER THE 1866 GRANTING ACT, WHERE LANDS WERE IN THE ACTUAL POSSESSION OF INDIANS.

Respondent's brief clarifies the issue before this Court by conceding (Respondent's brief, pt 1, pp. 12, 104–108) that the factual assertions of the complaint are to be deemed true, for purposes of this proceeding, and by characterizing as "irrelevancies" (*ibid.*, 13) the contrary assertions made by the respondent (R. 30–32, 71) and adopted by the courts below (R. 192–196, 211) as to the surrender or abandonment of Walapai possession and as to the lack of permanent occupancy by the Walapai Tribe of any lands whatever. The allegation of the complaint that the respondent has interfered, and threatens to interfere, with the Indian possession of the lands described (R. 8, 19–20) is not controverted or controvertible before this Court. The respondent seeks simply to justify such acts on the ground that matter of which the Court may take judicial notice establishes that the respondent is "the legal and equitable owner of the unburdened and unqualified fee simple title to all lands in controversy" (R. 25). Thus the issue before the Court has been narrowed down to the

issue of whether acts which would otherwise be unlawful are justified by matters of which a court may take judicial notice. If all of the acts so alleged are thus legally authorized as to all of the lands described in the complaint, then the complaint was properly dismissed. Otherwise it was not. *United States* v. *Mackey*, 216 Fed. 126 (C. C. A. 8th, 1914).

The primary question, therefore, is not, as respondent misconceives it, whether the Government or the Walapai Tribe has title to the lands in controversy (see pp. 2–3, *supra*), or even whether the Government or the Walapai Tribe has any exclusive property right at all in these lands, but rather whether the railroad has such a property interest in these lands as warrants it in interfering with the use of these lands by an Indian tribe and even in ejecting the tribe from areas tribally occupied from time immemorial. If the railroad has no such interest, then it is in no better position than a trespasser and clearly the United States would be entitled to protect its ward, the Walapai Tribe, from interferences such as are alleged in the complaint. It would have this right even if the Walapai Tribe were a mere licensee or permittee, subject to removal by the Government, so long as the Government has not actually removed the Walapai Tribe from the lands in question. And respondent has not, in support of its motion to dismiss, adduced any public act of which judicial notice could be taken removing

the Walapai Tribe from all the lands in litigation or even any act requiring such removal. (See pp. 41–69, *infra*.)

A plaintiff in possession need not allege or prove more than his possession in order to prevail in an action in trespass against a defendant who attacks the plaintiff's title or right to possession but does not show any superior right to possession in himself.[1] And when plaintiff happens to be the United States suing on behalf of a ward, which is alleged to have maintained continuous possession of described lands from time immemorial, there should be no doubt that it is entitled to relief unless the defendant enjoys a right to immediate possession sufficient to justify the acts of which complaint is made.

Thus the bare minimum which the Government must show, to warrant a reversal of the judgment dismissing the complaint, is that, as to at least some part of the area in which these acts of trespass by the railroad are alleged to have been com-

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[1] *Christy* v. *Scott*, 14 How. 282 (1852); *Burt* v. *Panjaud*, 99 U. S. 180 (1878); *Bradshaw* v. *Ashley*, 180 U. S. 59 (1901); *Williamson & Brown Land & Lumber Co.* v. *Mullins Lumber Co.*, 249 Fed. 522 (C. C. A. 4th, 1918).

Where lands are in actual possession of an Indian tribe, it has been held that an action of trespass will lie even against a grantee with a right to immediate possession, since the power to compel removal of an Indian tribe can be exercised only by the United States *Fellows* v. *Blacksmith*, 19 How. 366 (1856); and see *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55 (1886).

mitted, the railroad, if the factual allegations of the complaint are true, has no such right to immediate possession as would justify these acts.

The right to immediate possession of these lands asserted by the railroad derives from the 1866 granting act (act of July 27, 1866, 14 Stat. 292). If we examine this act, we find only three provisions which could possibly serve as a basis for any claim to title or possession by the railroad:[5]

(a) Section 3 of the act grants to the railroad, over a prescribed route, designated sections of public land—

> whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office: * * *

(b) Section 2 of the act contains this promise:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

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[5] It should be noted that despite the suggestion of the respondent to the contrary (Respondent's brief, pt. 1, p. 26), no claim is made in this action as to the actual right-of-way conferred on the railroad by section 2 of the act cited.

(c) Section 17 of the act provides:

> That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: *Provided*, That any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

If the grant under section 3, above cited, of lands "not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights" stood alone, the railroad would not have acquired those lands occupied by Indians under a claim of right. Such was the decision in *Cramer* v. *United States*, 261 U. S. 219 (1923) and such was the decision in *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733 (1875). In both these cases the granting act contained language similar to the language found in section 3 of the 1866 granting act but did not contain a promise to extinguish Indian title as found in section 2 of the 1866 act.

In the case of *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55 (1886) the granting words, similar to those of the 1866 act, were accompanied by a promise to extinguish Indian title in the lands granted. This Court, construing the statute as a whole, held that in order to give meaning to this promise the terms of the grant itself were to be enlarged so as to cover lands claimed by Indian occupants.[8] At the same time the Court held that as to such lands the railroad would take immediately only a bare title and that a right to immediate and exclusive possession would attach to the title when and only when the United States carried out its promise to free the land from the burden of Indian possession. This holding was followed in the recent decision of this Court in *Northern Pac. Ry. Co.* v. *United States*, 311 U. S. 317 (1940).

The Government agrees that in the case at bar, where the language of the grant and of the promise to extinguish Indian title correspond in all material respects to that found in the *Buttz* case, a similar result should be reached: the railroad should be deemed to have received, by virtue of the act itself, a legal title plus an expectancy based on the promise of the Government that a

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[8] This distinction between the *Buttz* case and the *Leavenworth* case is expressly noted in *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535, 543 (1892), by Justice Field, who had dissented in the *Leavenworth* case but acknowledged the error of this dissent 17 years later in the *Bardon* case.

right to immediate and exclusive possession would be superadded to the title at such time as the Government, with Indian consent, should find it to be "consistent with public policy and the welfare of the Indians" to terminate Indian possession and should act pursuant to that finding. This, however, according to the allegations of the complaint the Government has not yet done. On the contrary, from before 1866 to the date of the suit, the Walapai Tribe is alleged to have remained, as a ward of the Government, in actual possession, continued and exclusive, of the lands described in the complaint (R. 19).

Respondent seeks to escape the force of the holding of this Court in the *Buttz* case by arguing that because section 17 of the 1866 granting act authorizes the railroad to accept grants from Indian tribes located on reservations through which the railroad might pass, the promise of the Government to extinguish Indian title on grant lands must have referred only to reservation lands (Respondent's brief, pt. 1, pp. 16–17). This is a complete *non sequitur*. In fact, if the promise of the Government to extinguish Indian title applied *only* to those lands covered by section 17 of the act, as respondent contends, there was no compelling reason for including any such promise by the Government in the act. Under the respondent's construction, whatever the railroad could acquire under section 2 by action of the

Government with Indian consent it could just as well acquire under section 17 by action of the Indians with Government consent. If the promise of the Government to extinguish Indian title is to be given any real significance, it is necessary to hold that this promise was not directed or restricted to formal reservations (which at the time did not exist over a large part of the country to be traversed by the railroad), but that the Government's undertaking covered also (or perhaps solely) nonreservation lands claimed by Indian tribes or by individual Indians under right of aboriginal occupancy. Indeed this Court has recently held that a similar grant conveyed lands subject to the aboriginal right of occupancy where such lands were not within "technical reservations" (*United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 348–349 (1940)) and suggested that the lands within "technical reservations" would not be covered by the "extinguisher" clause and in fact would not be conveyed at all (*ibid.*, at pp. 349, 353–354). To the same effect is *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283 (1918).

If there were any doubt as to the propriety of including aboriginal occupancy claims within the scope of the "extinguisher" clause, that doubt would be resolved by administrative interpretation, not of other laws but of this particular undertaking, pursuant to which the Government,

during the two years following enactment of the granting act, secured cessions of aboriginal occupancy rights covering most of the land which the railroad was to traverse, from several Indian tribes, including some that had not previously had reservations or made treaties (Petitioner's brief, pp. 48–51).

If, however, it were to be held that the undertaking to extinguish Indian possessory rights related only to reservation lands, then the proper conclusion from this premise would be not that nonreservation lands claimed by Indians passed to the railroad, free and clear of all Indian claims, but that such lands were *not covered by the grant at all.* For if the promise to extinguish Indian title did not cover such nonreservation claims, we should have the situation presented by the *Cramer* case and the *Leavenworth* case.

There would be no necessity to give meaning to other phrases of the granting act by bringing lands so held and so claimed within the phrase "public lands * * * not reserved * * * and free from preemption or other claims or rights," which, on its face, excludes these lands. It would then have to be held that the railroad took nothing at all as to such lands.

The Government submits that the fairer interpretation of the statute is that the undertaking of the United States was a general undertaking to extinguish all Indian possessory claims burdening the lands granted and that all lands covered by

these claims passed to the railroad subject to whatever right or claim of occupancy the Indians had, as in the *Buttz* case.

No canons of construction have been cited by the respondent which would require or justify any different conclusion as to the interpretation of the granting act.[7]

Respondent has shown no law subsequent to the 1866 granting act which amends the procedure expressly set forth in the granting act whereby the right to immediate possession might be added to the legal title conveyed to the railroad.[8]

If respondent is to prevail, then, it must show that the Government has, by extinguishing Indian possession as to the lands described in this complaint, enlarged the rights originally conferred upon the railroad. The complaint itself asserts that the Indians have continued in possession of these lands, from which it may be deduced that the United States has not removed the tribe from these lands. The respondent has advanced many arguments to show a loss of Indian possessory rights as to those lands which the Indians have voluntarily abandoned, or from which they have been forced to remove; but it has advanced no argument whatsoever to show any extinguishment by the Government, with Indian consent, or even without Indian consent, of any right or any claim

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[7] The matter of applicable canons of interpretation is dealt with at pp. 41–45, *infra*.

[8] See pp. 63–69, *infra*.

in lands which the Walapai Indians still claim and occupy as their own. Respondent, therefore, has failed to show the only possible basis on which the alleged acts of trespass asserted in the complaint, could, as a matter of judicial notice, be defended.

Point 2

Respondent has advanced no sound reason for overthrowing the long-established doctrine that aboriginal occupancy of a defined area by an Indian tribe confers upon the tribe a possessory right which can be extinguished only by the United States.

The case of the Government, as indicated in the preceding discussion, does not depend upon proof that the Indian possession alleged in the complaint involves a legal title or even an exclusive possessory right. The mere fact that the land was, as alleged in the complaint, possessed and claimed by Indians whose aboriginal possession had not been terminated by removal or abandonment (R. 4, 8–10, 15–19) prevented the railroad from acquiring, by virtue of the Granting Act, anything more than a legal title together with a conditional promise of the Government to extinguish the Indian claim and possession, if and when certain conditions should be found to exist.

The respondent has not demonstrated either that the Government is bound to allege more than this, as a matter of law, or that it has alleged less than this as a matter of fact. The respond-

ent's entire argument, so far as relevant to the case at all, is designed to show that the Walapai Indians are without an exclusive possessory right to the lands in question. This contention is not only legally inadequate to sustain the dismissal of the complaint, but it is also erroneous as a matter of law.

The Government, in its main brief, made no attempt to prove the soundness of the general rule that aboriginal occupancy gives rise to a right of possession valid against all parties other than the United States, because this rule is so elementary and so basic in Federal Indian law that the Government never expected that respondent would challenge the rule. Indeed, the Circuit Court of Appeals in its opinion below (R. 206–210) expressly acknowledged the validity of this rule, questioning only the applicability of the general rule to the area of the Mexican Cession because of alleged peculiarities of Spanish and Mexican law.*

* "Appellant argues that there is uniform governmental policy of recognizing rights of occupation as vested in all Indian tribes with respect to land actually occupied by them at the time they were brought under the sovereignty of the United States and that such rights were good against all but the Government of the United States. It must be conceded that this view is consistent with what has been the common practice in dealing with the Indians occupying lands other than lands within the area ceded by Mexico to the United States. Cf. *Bates* v. *Clark*, 94 U. S. 294; *Spalding* v. *Chandler*, 160 U. S. 402, 403. Their practice, has been based upon the policy of maintaining just and peaceable relations with the Indians and is discussed and considered

Respondent's brief now challenges the basic doctrine of aboriginal occupancy rights, denying that aboriginal occupancy confers any rights whatever. The whole doctrine of aboriginal occupancy rights, respondent now contends, is erroneous, a figment, as respondent says, of "universal absolutes in the dictum of cases" (Respondent's brief, pt. 1, p. 10), "metaphysical dictum" (*ibid.*, p. 82), "a mistaken generalization of history" (*ibid.*, p. 75), "pernicious abstractions" (*ibid.*, pp. 76–77), and perhaps even a belief in the "Great Spirit" (*ibid.*, p. 82). For this reason, respondent is not under the necessity of meeting the detailed argument of petitioner's main brief (pp. 15–59), showing that the

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in a number of early cases, such as *Johnson* v. *Graham*, 8 Wheat. 543, decided in 1823.

"But, since the whole of the Indians' title depends entirely upon the policy of the federal government, it is obvious that what may have seemed the best policy in dealing with Indians in territories acquired prior to the treaty of Guadalupe Hidalgo might not have seemed the best policy in dealing with Indians occupying the area ceded by Mexico in that treaty." (R. 206.)

The Circuit Court and the respondent frequently refer to the recognition of Indian title as a matter of "policy" rather than "law." The distinction is relevant only where the issue is between the Indians and the United States, as to which it may reasonably be urged that Indians are protected in what they claim on legal grounds but not in what may or may not be granted as a matter of policy. The distinction, however, is irrelevant as to third parties. The rights of a tenant at will may be terminated by the landlord as a matter of policy or discretion but this does not make any the less legal the rights of the tenant at will against a trespasser.

law and policy applicable to the Mexican Cession area corresponded precisely with the law and policies of the United States applicable in other areas.

This argument of the respondent against the existence of aboriginal occupancy rights has at least the merit of directness and courage, for it would be difficult to find any doctrine in American law that has been more persuasively maintained or more consistently followed, in the decisions of this Court, than the doctrine of aboriginal occupancy rights first formulated by Chief Justice Marshall in *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823), which is cited with approval in some 32 subsequent cases in this Court.

In its criticism of the doctrine of aboriginal occupancy rights, respondent does not cite a single decision of this Court which is inconsistent with that doctrine, but contents itself with a demonstration that in 13 of the cases in which that doctrine has been maintained some special circumstances existed rendering it unnecessary for the Court to lay down any general rule broader than the facts of the particular case.

It is true, of course, that any general rule is broader than the facts of any given case, but this is not a valid reason for rejecting the rule as inaccurate. In order to justify such a rejection it must be shown that the rule criticized ignores operative facts in the cases and that some alternative rule takes account of such operative facts

in the cases. Neither of these burdens is borne by the respondent. The respondent does suggest an alternative rule, namely, that Indians have no rights of occupancy except such rights as have been specifically [19] conferred upon particular tribes by treaty or otherwise. Respondent does not show that even under the rule it proposes the Walapai would be without rights, and there is a good deal of administrative action recognizing Walapai claims to all or part of the lands described in the complaint. (Samples of this material are set forth or cited at pp. 37–42 of Petitioner's Appendix.) It is more important, however, to point out that the rule of law proposed by respondent is not supported by any direct authority, and certainly not by any authority emanating from this Court.

At most, respondent shows that in two of the 13 cases which it considers, to wit, *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823), and *Mitchel* v. *United*

[19] The emphasis upon "specific" conferring of rights upon a particular tribe is made by respondent whenever it considers general legislation under which the Walapai claim protection. Nevertheless, in attempting to "distinguish" cases recognizing aboriginal occupancy rights where there was in fact no specific grant and no specific recognition of rights in the tribe concerned by the sovereign, respondent uses the phrase "specifically conferred" and other similar phrases to cover the recognition of Indian rights by general rules and statutes (Respondent's brief, pp. 81, 84). So applied, respondent's argument ceases to have any pertinence to the case at bar, since clearly the Walapai Tribe is not excluded from rules and statutes of general scope.

States, 9 Pet. 711 (1835), this Court might have limited its statements about occupancy rights to situations where treaties existed. The fact remains that this Court even in these two cases did not base its opinion on the existence of treaty rights and could not reasonably have done so since the treaties involved, here as elsewhere, purport not to create new rights but to confirm, define, diminish, or reinstate prior Indian rights.

The only alternative which the respondent suggests to the accepted theory of aboriginal occupancy rights is the doctrine that all Indian rights in land must be based upon some specific act of the sovereign creating rights in a particular tribe. According to this theory, the first treaty of land cession between the United States and any Indian tribe amounts to a grant of land from the United States to the Indians. The language of such treaties indicates precisely the reverse.[11] It was the Indians who ceded land to the United States, reserving for themselves such lands as they needed or else accepting in exchange for the cession a grant of lands

[11] Typical is the language of the Treaty of August 3, 1795 (7 Stat. 49), with the principal tribes of the Northwest Territory in which "the said Indian tribes do also cede to the United States the following pieces of land" (Art. 3) and the United States assumes an obligation to pay to the Indians a fixed sum in consideration of the "cessions and relinquishments of land made in the preceding article by the said tribes of Indians" (Art. 4). For a further analysis of similar treaty provisions, see Cohen, *Handbook of Federal Indian Law* (1941), pp. 43–47, 48–67.

in another locality. The language of the treaties corresponded to reality and cannot now be impugned by the respondent as involving a course of studied deceit and hypocrisy. If treaties of cession were really grants of land by the United States to the Indians, the Indians should have paid the United States. The fact remains that regularly, in these transactions, it was the United States that paid the Indians.

The attempt of the respondent, therefore, to characterize as irrelevant all cases in which treaties may be found involves an utter misconception of the scope and function of Indian treaties. In *United States* v. *Winans*, 198 U. S. 371 (1905), this Court noted that Indian treaties must be read as limitations upon preexisting aboriginal rights and not narrowly construed as grants to the recipients of charity:

> At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands and to define rights outside of them.
>
> * * * * *
>
> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians

> than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. * * * [At pp. 379, 381.]

Finally, if we consider respondent's criticism (Respondent's brief, pt. 1, pp. 75–88) of cases in which the rule of aboriginal occupancy rights is stated and applied, we find that the criticism ignores not only the reasoning of the Court and the language of the treaties in all eight of the cases considered but also the actual decisions in at least six of these cases. Had respondent devoted its analysis to the consistency or inconsistency of these decisions with the theory that it proposes, instead of trying to demonstrate the existence of various irrelevant factors in each case, it would have been compelled to come to the following conclusions:

1. *Worcester* v. *Georgia*, 6 Pet. 515, 546 (1832), squarely rejects, and is inconsistent with, the respondent's theory. In that case the charter from the Crown to Georgia under the theory advanced by the respondent should have given an unencumbered title over the Cherokee country to Georgia, leaving no rights in the Indians and, particularly, no rights which the Indians could later convey to the United States. Had this Court

accepted this theory, it should have decided the case in favor of the State of Georgia. It decided the case the other way on the express ground that the grant to Georgia left intact the aboriginal possessory right, which was later the subject matter of treaties between the Cherokee Nation and the United States.[12]

2. In *Chouteau* v. *Molony*, 16 How. 203, 239 (1853), this Court held that a purported grant from a Spanish Governor was ineffective to convey an unburdened title, because the land was subject to aboriginal occupancy rights. Under the respondent's theory, there were no such rights, and the case should have been decided the other way. To point out, as respondent does (brief, p. 82), that the possessory rights of the Fox Indians were whittled down by a treaty with the United States made in 1832 shows not, as respondent suggests, that the Indians had no rights in 1796, the date of the Spanish grant, but precisely the opposite.

3. In *Holden* v. *Joy*, 17 Wall. (84 U. S.) 211 (1872), the defendant, Joy, claimed under certain Indian treaties, while the plaintiff, Holden,

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[12] Erroneous, as well as irrelevant, is respondent's contention (brief, pt. 1, p. 79) that the Cherokee were recognized as a "nation" but that the Walapai were not. The Walapai were just as much a "nation" in the sense in which this term has been applied to Indian tribes as were the Cherokee. Explicit recognition of the Walapai Tribe as capable of "hostility" and "amity" towards the United States is found in *Lake* v. *United States and Hualapai Indians*, 35 Ct. Cl. 15 (1899). (See Petitioner's main brief, p. 24.)

claimed under preemption acts of Congress. On behalf of the plaintiff's claim it was argued that the Constitution expressly vests in Congress control over public property and that a series of treaties made by the President and Senate with Indian tribes could not constitutionally dispose of public land to the defendant in a manner that conflicted with modes of public land disposition prescribed by Congress and availed of by the plaintiff.[13] This Court, in rejecting that argument, and holding for the defendant, pointed out that the occupancy right in the land in question had been in the Indians from the start and was therefore clearly subject to disposition by Indian treaties. This was a direct holding on a principal issue of the case and cannot properly be dismissed as "metaphysical" dicta, as respondent urges (brief, p. 82). Nor can the carefully reasoned opinion of this Court in the case cited be discredited as respondent tries to do (brief, p. 82) because this Court was tolerant enough to state the view of the Indian parties to these treaties, using in that context the Indian expression, "Great Spirit," at the same time that it stated in more technical terms the views of the white parties to these treaties.

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[13] A similar argument is advanced by respondent in this case to show that the creation of a reservation for the Walapai by Executive order in 1883 was "a void effort to achieve a prohibited end." (Respondent's brief, pt. 1, p. 64.)

4. In *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55 (1886), while it is true that the actual decision did not directly involve the Government or the Indians, the importance of the case and the basis of its decision lay in the determination that "At the time the act of July 2, 1864, was passed the title of the Indian tribes was not extinguished" (at p. 66), and that, "The grant conveyed the fee subject to this right of occupancy" (*ibid.*). Respondent attempts to distinguish the case by noting that in 1867 a reservation was set aside for the Sisseton and Wahpeton Sioux. The respondent fails to note, however, that the lands involved in the case were not those contained in the reservation. Far from supporting in any way the respondent's position, the fact that there was such a treaty in the *Buttz* case merely cuts the ground from under another argument of the respondent (see Respondent's brief, pt. 1, p. 49), namely, that the establishment of a reservation necessarily wipes out aboriginal occupancy rights in areas outside the reservation. The Court in the *Buttz* case notes that Congress in 1872 recognized that the interests of the Sisseton and Wahpeton Sioux in lands outside of the reservation set apart for them remained valid and valuable and were properly the subject of a further agreement of cession (119 U. S. at pp. 68–69). It was the lands involved in this cession that were the subject of the controversy in the *Buttz* case.

5. In *Cramer* v. *United States*, 261 U. S. 219 (1923), the affirmation of aboriginal occupancy rights was clearly a ground of the decision and not an erroneous dictum, as respondent urges (brief, p. 85), and it is clear that on the respondent's theory that no such rights exist, the case should have been decided the other way. The only kind of "affirmative recognition" which appeared in the record in the *Cramer* case was *general* recognition of Indian occupancy rights in areas that Indians had improved or occupied, which is of course equally applicable to the areas improved or occupied by the Walapai Indians.

6. The second Shoshone case, *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938), involving treaty lands, might perhaps have been decided without reference to the concept of aboriginal rights, but respondent's contention that the issue of aboriginal rights was wholly irrelevant (brief, pt. 1, p. 86) is not sound. The question in that case was whether occupancy rights assured by treaty included a right to minerals. On this point the treaties themselves were silent. If the treaties effectuated a pure gratuity from the United States to the Indians, it might have been proper to construe their provisions strictly and to exclude minerals from the gift. If, on the contrary, these treaties effected an exchange or delimitation of rights which the Indians possessed prior to any treaties, then it was proper for this Court to examine into the scope of such rights and to construe

the treaty provisions in the light thereof. It was therefore relevant for this Court to find and declare (at p. 117, citing *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 Pet. 515) that Indian occupancy gave rise to rights "as sacred and as securely safeguarded as is fee simple absolute title" (at p. 117), that these rights were not limited to the surface of the soil, and that treaties which said nothing specific about minerals should be construed as guaranteeing to the Indians the same kind of rights they had enjoyed before they made any treaties, i. e., "the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial" (at p. 117). In short, a conception of aboriginal rights of occupancy existing as a result of undisturbed possession "from time immemorial," helped this Court to reach the decision which it did reach in favor of the Shoshone Tribe. Acceptance of the respondent's theory, which denies the existence of such aboriginal rights, would have militated against the decision actually reached, although the decision might perhaps have been reached anyway, even upon the respondent's premises, along other courses of reasoning.

Thus, of the eight leading cases in this field which were discussed in petitioner's brief and which the respondent seeks to "distinguish" away, analysis shows that while two cases might have been (but were not) decided without reference to the question of aboriginal rights, the remaining

six cases definitely support the petitioner's view of aboriginal rights and are either difficult to reconcile or flatly inconsistent with the respondent's view that there are no such rights.

As between the two doctrines, the entire weight of direct judicial authority is in favor of the rule upon which petitioner rests its case.[14]

The rule for which respondent contends finds judicial support neither in direct decision nor in

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[14] It would unduly lengthen this brief to treat in detail of additional cases cited in Footnote 8 of petitioner's main brief, which respondent attempts to distinguish. (Brief, pt. 1, pp. 86-88.) It is enough to suggest that detailed analysis will indicate that in two of these five cases, *Spalding* v. *Chandler*, 160 U. S. 394 (1896), and in *Minnesota* v. *Hitchcock*, 185 U. S. 373 (1902), the affirmation of aboriginal occupancy rights constitutes at least an alternative ground of decision.

The only judicial authority that is cited by respondent for the rule that Indian title does not exist in the absence of specific affirmative recognition, is a dictum by the Court of Claims in *Hoyt* v. *United States*, 38 Ct. Cl. 455, 464 (1903), quoted in Respondent's brief, pt. 1, at p. 33, and again at p. 93, that "Indian country" in New Mexico and Utah was limited to formal reservations. This view (which seems to have been largely based on the opinion of this Court in *United States* v. *Joseph*, 94 U. S. 614 (1876)), was definitely repudiated in *United States* v. *Candelaria*, 271 U. S. 432 (1926), and *United States* v. *Chavez*, 290 U. S. 357 (1933). Any inference from this dictum that the Court of Claims intended to deny these Indians a possessory right in the lands they aboriginally occupied is refuted by the opinion of the Court of Claims itself in *Ute Indians* v. *United States*, 45 Ct. Cl. 440 (1910), where it was held relinquishment of aboriginal possessions was valid consideration for an agreement by the United States. And see Petitioner's main brief, p. 28.

analogy. If the respondent's argument that Indian tribes enjoy only those rights specifically conferred by the Federal Government were sound, then all rights of tribal self-government would have to be derived from specific acts of Congress. Uniformly, however, in those cases where the existence of aboriginal rights of tribal self-government has been in issue, this Court has affirmed the existence of such rights. Thus in *Talton* v. *Mayes*, 163 U. S. 376 (1896), this Court refused to upset the proceedings of a tribal court, allegedly in conflict with the Fifth Amendment, declaring "that as the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment * * *." (At p. 384.)

Many other cases[15] may be cited in which it has been held that "*those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress,*

[15] To cite only three: In *Ex parte Crow Dog*, 109 U. S. 556 (1883), this Court held that in the absence of express Federal legislation to the contrary, jurisdiction over the murder of one Indian by another was vested in the tribe itself, and in *United States* v. *Quiver*, 241 U. S. 602 (1916), a similar conclusion was reached with respect to the offense of adultery. In *Jones* v. *Meehan*, 175 U. S. 1 (1899), this Court held that in the absence of Federal legislation to the contrary, the inheritance of Indian lands was governed by the rule of the tribe and not by the rule of the Interior Department.

but rather inherent powers of a limited sovereignty which has never been extinguished."[16]

Respondent invokes the support of uncited opinions of the Attorney General (Respondent's brief, pt. 1, p. 9) for its view that there are no Indian rights of occupancy except such as may be specifically conferred by the Federal Government. A contrary view is persuasively set forth in the most comprehensive opinion that any Attorney General has written on the nature of Indian occupancy rights.[17] From that opinion the following excerpts are taken:

> But a right of "occupancy" or "occupancy and use" in the Indians with the fee title in the sovereign (the Crown, the original States, the United States) is the same condition of title which has prevailed in this country from the beginning, except in a few instances like those of the Cherokees and Choctaws, who received patents for their new tribal lands on removing to the West. And the Indian right of occupancy is as sacred as the fee title of the sovereign.

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[16] "Powers of Indian Tribes," 55 I. D. 14, 19 (1934). The decisions in this field are analyzed in this opinion of the Solicitor of the Interior Department, which served as a basis for the drafting of tribal constitutions approved by the Secretary of the Interior, pursuant to section 16 of the act of June 18, 1934 (48 Stat. 984, 987; 25 U. S. C. sec. 476), including the constitution of the Walapai Tribe, which was approved on December 17, 1938.

[17] 34 Op. Atty. Gen. 181 (1924).

> The courts have applied this legal theory indiscriminately to lands subject to the original Indian occupancy, to reservations resulting from the cession by Indians of part of their original lands and the retention of the remainder, to reservations established in the West in exchange for lands in the East, and to reservations created by treaty, Act of Congress, or executive order, out of "public lands." The rights of the Indians were always those of occupancy and use and the fee was in the United States. * * * [At p. 187.]

In the opinion from which these excerpts are taken, Attorney General Stone went on to apply this theory to the specific question of whether Indian occupancy protected by an Executive order that made no mention of mineral rights nevertheless included mineral rights. The question was similar to that presented in the second *Shoshone* case. If an Executive order in effect gives Indians Federal property as an act of grace, it might be construed more narrowly than would be proper if such an order amounts to a confirmation or defining of a preexisting right. On this question the Attorney General declared:

> * * * If it were necessary here to decide as between these opposing views, I should incline strongly to the latter; mainly because the Indian possession has always been recognized as complete and exclusive until terminated by conquest or treaty, or

by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553. Moreover, support for this view is found in many expressions of the courts. Thus, in the case just cited, the court quotes from *Beecher* v. *Wetherby,* 95 U. S. 517, 525, as follows:

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take *only the naked fee,* and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States." [At p. 191.]

Respondent advances no authority and no reason which would justify this Court in reversing a rule that has been tested for more than a century, has been consistently affirmed in careful and well-reasoned opinions, has been the basis of hundreds of treaties and agreements, and is in conformity with basic standards of justice and fair play. Respondent argues that the rule of aboriginal occupancy rights is supported only by dicta and not by actual decisions, but for the alternative rule which it proposes it can claim the support of no decision and no dictum.

It is clear that the doctrine of aboriginal occupancy rights is as applicable to the area involved in the case at bar as to any other part of the

United States. It is therefore unnecessary to determine whether this doctrine is ultimately to be derived from the more general rule that rights existing under former sovereignties, including rights of tenancy, are not terminated by the mere fact of conquest but remain in effect unless expressly abrogated by a new sovereign (see Petitioner's brief, p. 76), or whether the doctrine of aboriginal occupancy rights is to be derived from Federal statutes and particularly the Indian trade and intercourse laws, as Chief Justice Marshall suggested (Petitioner's main brief, p. 38), or whether the doctrine rests upon both bases equally.

In seeking to show the error of the view taken by the Circuit Court of Appeals that the rule of aboriginal occupancy, although generally applicable in the United States outside the Mexican Cession area, was not applicable inside that area, it became necessary for petitioner to demonstrate that insofar as this rule might be derived from the Indian trade and intercourse laws, these laws had the same application within the Mexican Cession area as outside that area (Petitioner's main brief, pp. 36–40). Respondent now argues that the Indian trade and intercourse laws did not create or recognize any aboriginal rights whatever[18] (Re-

[18] On this point, however, respondent is not consistent. At page 77 of its brief (part 1) it admits in a footnote that the original trade and intercourse law, the Ordinance of September 22, 1783 (25 Jour. Cont. Cong. 602, Lib. of Cong. ed.) did give Indians "possessory rights."

spondent's brief, pt. 1, pp. 75–94). If this argument is sound, all that it proves is that the question of whether these laws were extended to the Mexican Cession area so that those portions of the area occupied by Indians became "Indian country," a question to which respondent devotes some attention (Respondent's brief, pt. 1, pp. 91–94), is completely irrelevant to any issue in the case at bar. If these laws had nothing to do with Indian title, then respondent is not aided by an attempt to show that they had only a limited applicability to the Mexican Cession area.

For the sake of clarity, however, it should be noted that the respondent's criticism of petitioner's contention concerning the effect of the Indian trade and intercourse laws completely misses the point. In seeking to refute petitioner's view that the Indian trade and intercourse laws "conferred upon the historical fact of aboriginal occupancy the character of a Federal legal right or privilege, by affording legal protection to such occupancy against various forms of trespass by parties other than the United States" (Petitioner's main brief, p. 36), respondent frames and tears apart two caricatures of petitioner's view. First, respondent ascribes to petitioner, and proceeds to attack, the idea that "possession, a fact, creates a legal right" (Respondent's brief, pt. 1, p. 75). Then respondent attacks the idea that the intercourse laws by themselves create possessory rights, regardless of any facts of possession, e. g., that

extending intercourse laws to Arizona would give Indians possession of the entire State (*ibid.*, p. 89). Neither of these positions nor their sum is the position of the petitioner. The position of the petitioner is that specific Indian possessory rights are a product of two factors: (a) the fact of continuous occupancy of particular areas, and (b) general legal rules (statutory or common law) which afford protection to such occupancy. Against that position respondent advances no substantial argument.

Point 3

The right of the Walapai Tribe was not extinguished.

Under this heading the Government will first answer generally the arguments of the respondent that the Walapai Tribe's rights of occupancy were extinguished and then will discuss separately the statutes and administrative actions prior to the passage of the granting act of July 27, 1866, which the respondent contends extinguished the Walapai rights, and in conclusion will discuss the statutory and administrative action after July 27, 1866, which the respondent advances to show extinguishment. Most of the statutes and administrative action relied upon by the respondent to show extinguishment of the Walapai's rights of occupancy are completely irrelevant to the issues in this case.

A. THE EXTINGUISHMENT OF INDIAN OCCUPANCY RIGHTS REQUIRES UNEQUIVOCAL ACTION.

The material advanced by the respondent is irrelevant for three reasons. In the first place, the granting act of July 27, 1866, under which the respondent claims rights, is not ambiguous, and neither any other statutes—unless they modify the act of July 27, 1866—nor any administrative action could change the rights of the railroad which were crystallized in the granting act.

In the second place, the statutes and administrative conduct referred to by the respondent do not have the effect which the railroad says they have.

In the third place, the entire argument of the respondent concerning extinguishment violates three recognized canons of statutory construction.

A cardinal rule of construction in statutes affecting Indians has often been invoked by this Court:

> * * * doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.[19]

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[19] *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912).

As a corollary to this canon of construction Attorney General Stone in 34 Op. Atty. Gen. 171, 172, has likewise held:

> The long settled rule of construction is that general laws providing for the disposition of public lands or the public domain do not apply to lands which have been set aside or reserved for particular public uses, unless the contrary clearly appears from the context or the circumstances attending the legislation. * * * Concerning Indian reservations, Indian lands, and Indian affairs generally, Congress habitually acts only by legislation expressly and specifically applicable thereto.

A second canon of construction which is violated by the defendant's argument is that a public grant in case of any ambiguity is construed in favor of the Government. As was said in *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733, where a land grant to another railroad was involved:

> In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If, on examination, there are doubts about that intention or the extent of the grant, the government is to receive

> the benefit of them. * * * That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the Government, and saved from a possible grant, is a proposition which will command universal assent. * * * [At p. 746.]

A third canon of construction relevant to this case is that which directs an interpretation of ambiguous statutes that will best conform with existing treaties. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook* v. *United States*, 288 U. S. 102, 120 (1933); and see *United States* v. *Payne*, 264 U. S. 446, 448 (1924); *Chew Heong* v. *United States*, 112 U. S. 536, 549–550 (1884); *United States* v. *Forty-three Gallons of Whiskey*, 108 U. S. 491, 496 (1883). It has already been noted (Petitioner's main brief, pp. 47–48) that the United States, by treaty with Mexico, promised that the Indian tribes of the Mexican Cession would not be put "under the necessity of seeking new homes." Petitioner readily admits the respondent's argument (brief, pp. 72–73) that Congress had power to violate or abrogate the treaty with Mexico, but the fact remains that Congress did not do so, and if there is any ambiguous Congressional legislation which can be interpreted either in a manner consistent

or in a manner inconsistent with the treaty, the former interpretation should be preferred.

If there are any ambiguities in the legislation or administrative action upon which respondent relies to establish a denial and extinguishment of Walapai occupancy rights those ambiguities should therefore, in conformity with established rules of construction, be resolved in favor of the continuance of such rights.

Against the force of these established principles of construction respondent advances an argument that any ambiguity in the granting act or in other statutes or in the administrative action should be resolved in the light of Federal "policy." If, in spite of *Hamilton* v. *Rathbone*, 175 U. S. 414, 421 (1899), holding that the province of construction lies wholly within the domain of ambiguity and that "prior acts may be resorted to, to *solve* but not to *create* an ambiguity," it should be considered proper to construe Federal policy in relation to the granting act, a distinction should be drawn between the policy that is embodied in the governing statute of 1866 and policy elsewhere expressed. Of the two the former is entitled to the greater weight, and, as already noted, the policy embodied in the 1866 granting act recognized and safeguarded Indian occupancy rights. Respondent ignores this aspect of Federal policy and goes far afield to collect

evidences of a contrary policy. The Government submits that the picture of Federal policy thus drawn by the respondent seriously misrepresents the position of the Government and the existing facts.

In brief, respondent's argument is that the United States pursued "one clear purpose, to develop all the lands of Arizona with specified exceptions known as reservations, for and by white men" (Respondent's brief, pt. 1, p. 12; also pp. 14, 15, 23).[20] This policy, according to respond-

[20] As bearing upon the policy of confining Arizona Indians to reservations and as showing an intent to confine the Walapai Indians to the Colorado River Reservation, respondent asserts, with reference to the war waged against the Walapai Tribe from 1865 to 1868, that "the purpose of the campaigns was to force the Indians to go to the homes provided for them by Congress" (Respondent's brief, pt. 1, p. 54). This is wholly untrue and constitutes an illuminating example of the danger of following the respondent's theory that questions of this sort should be decided without a trial. In fact, the Walapai war was instituted by the Walapai "on account of the killing of a chief of their tribe by a drunken teamster on the road from Fort Mojave to Prescott" (Report of Superintendent of Indian Affairs, Arizona Territory, dated September 27, 1865, in Walapai Papers, p. 37). The war was ended in 1868, without any suggestion, on the part of the military, that the Walapai Indians were to go to the Colorado River Reservation. The only possible basis for respondent's theory is orders issued by General Gregg on April 23 and 24, 1867, which threatened military measures against all Indians outside of reservations. It appears that General Gregg was severely castigated by his superior officer for this order and the order was withdrawn on June 11, 1867 (see Report of the Secretary of War, House Executive Documents, vol. 2, pt. 1, 40th Cong., 2d sess., 1867–1868, pp. 105–106, 109–112; and see Re-

ent, was to be achieved by force and not by agreement (*ibid.*). According to the respondent, "All the country along this route [from Isleta to the Colorado River] was once 'occupied,' in one way or another, by savages, none of whom except the Navajo had ever 'voluntarily ceded' claim to any of it" (R. 92–94; Respondent's brief, pt. 1, p. 19; also pp. 26, 38–39). Against this background of fact and of policy, respondent argues, a failure to extinguish Walapai occupancy rights would constitute a startling exception. Moreover, respondent argues, since the right of occupancy is as sacred as the fee, the railroad, under such a construction of the pertinent statutes, would have received nothing of value (Respondent's brief, pt. 1, p. 19). A naked fee subject to Indian occupancy rights, it is said, could not be mortgaged or sold (Respondent's brief, pt. 1, pp. 19–20). To hold that the railroad received a valueless title, respondent argues, would be to convict the United States of fraud or imposition and of enacting a "granting act" which did not grant anything of value (Respondent's brief, pt. 1, p. 26). Finally, such a rule would unsettle all titles in Arizona (Respondent's brief, pt. 1, p. 19).

At each point the foregoing argument breaks down under close inspection. It is not true that the

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port of the Acting Commissioner of Indian Affairs, 1867, p. 155). Thus is the order of a subordinate military officer, misguided in purpose and promptly revoked, treated as evidence of an established national policy.

policy of the Federal Government was designed exclusively for the benefit of white men. On the contrary, the Federal Government, insofar as it was interested in encouraging settlement, drew no distinction between white men, black men, and red men. Where Indians were actually making use of lands the Federal Government bent every effort to protect that occupancy, as witness the decision of this Court in *Cramer* v. *United States*, 261 U. S. 219 (Petitioner's brief, p. 25), the action of Congress in inserting a proviso for the protection of Indian occupancy in the granting act in the case at bar (Petitioner's brief, p. 13), and repeated instructions from the Interior Department warning against the granting of white homesteads even outside of reservations on lands actually used by Indians.

Thus, for example, following a strong recommendation by the Commissioner of Indian Affairs, in a letter to the Secretary of the Interior, dated June 29, 1883, which protested against the issuance of homesteads in lands occupied by Indians in the Prescott District of Arizona (which included the Walapai country), a special circular was issued to registers and receivers in the General Land Office. This circular, sent by Commissioner of the General Land Office McFarland on May 31, 1884, declared:

> * * * you are hereby instructed to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the posses-

> sion of Indians who have made improvements of any value whatever thereon. [3 L. D. 371, 372.]

The circular of Commissioner Sparks, dated October 26, 1887, after setting forth the circular of May 31, 1884, in full, and calling attention to reports of violations of those instructions, declares:

> The foregoing instructions apply to every land district and to all lands occupied by Indian inhabitants in any part of the public land States and Territories of the United States.
>
> * * * * *
>
> You are enjoined and commanded to strictly obey and follow the instructions of the above circular and to permit no entries upon lands in the possession, occupation, and use of Indian inhabitants, or covered by their homes and improvements, and you will exercise every care and precaution to prevent the inadvertent allowance of any such entries. [6 L. D. 341, 342.]

It is not true that the Federal Government preferred force to voluntary agreement as a method of opening up Arizona to settlement, and respondent offers no instance of any such preference. Indeed, so far is the respondent from establishing the existence of its asserted policy against agreements of land cession that it feels obliged to engage in an arduous effort to prove that the Walapai Tribe agreed to surrender the entire Walapai

country in exchange for a right to live on the Colorado River Reservation (Respondent's brief, pt. 1, pp. 49–51; and *cf.* Petitioner's brief, pp. 42–44, 98–99). Petitioner, insisting that no agreement of cession has yet been made with the Walapai Tribe, also insists that it is still within the power of the Walapai Tribe and the United States to make an agreement for land cession fair to both parties and to all third parties.

So far was the United States from the suggested policy of refusing to make land cession agreements in the area traversed by the respondent railroad that in fact it opened up the projected route of the Atlantic and Pacific Railroad by a series of treaties, concluded within two years after the Railroad Grant Act of 1866 whereby aboriginal occupancy rights of the Arapaho, Cheyenne, Kiowa, Comanche, Eastern Apache, and Ute Tribes, which maintained aboriginal occupancy rights east of Isleta, were extinguished (see Petitioner's brief, p. 49). West of Isleta, in the area on which the Atlantic and Pacific Railroad actually constructed its line, the land surrounding the greater part of this right-of-way was (despite the denial of this fact at pp. 19, 26, and 39 of Respondent's brief) [21] opened to settle-

[21] Respondent's error in this respect has precedent in official reports. Thus the Secretary of the Interior's report of 1860, cited by respondent (brief, pt. 1, p. 44) asserts that no treaties had been made with Arizona tribes although at that time treaties had actually been made with the two

ment by treaties with the Navajo and the Apache (Petitioner's brief, p. 49) and only the remaining small fraction appears not to have been covered by any treaty or agreement of cession. At the very least, then, the respondent's predecessor received the greater part of all the lands to which it could possibly lay claim, freed of all Indian occupancy rights by voluntary agreement of the Indians themselves. Certainly the proviso in the granting act that Congress would extinguish such rights only with Indian consent and only if it considered such extinguishment in the public interest was a sufficient warning that some portion of the grant lands would be burdened with an Indian occupancy right. In this aspect of the case the charge that protection of such occupancy rights would amount to bad faith is wholly unjustified. Entirely rhetorical is the respondent's "forceful reminder that purchase and not confiscation is the American way of obtaining private properties for Indian use" (Respondent's brief, pt. 1, p. 60) when the respondent's whole argument is designed to show (erroneously in the opinion of petitioner) that confiscation and not pur-

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most important tribes of Arizona, the Apache and the Navajo, and with a third tribe, the Ute or Utah, occupying a small part of Arizona. See Treaty of September 9, 1849, with the Navajo Tribe (9 Stat. 974); Treaty of July 1, 1852, with the Apache Nation (10 Stat. 979); Treaty of December 30, 1849, with the Utah (9 Stat. 984). And see various treaties discussed and cited at pp. 49–50 of petitioner's main brief.

chase is the American way of obtaining Indian properties for non-Indian use—in Arizona.

Finally, the respondent's argument that it was imposed upon by the Government, if in the small part of its grant lands that may be subject to Walapai occupancy, such occupancy rights were not promptly extinguished is without merit. The argument that ownership of land subject to an Indian occupancy right is worthless because the occupancy right is substantially as valuable as the fee, is entirely fallacious. Lands burdened by an Indian occupancy right have been bought and sold for valuable consideration. The value of such lands depends, like the value of any future interest, upon a contingency. The contingency in this situation is that the United States (and not the railroad) will remove the Indians from the lands, or that the Indians themselves will abandon the lands. In either case, the right of possession will then automatically accrue to the holder of the fee. Titles burdened by Indian possession have been the subject of many important transactions noted by this Court. See *Clark* v. *Smith*, 13 Pet. 195, 201 (1839); *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 68 (1886). The alleged quotations from the opinion of this Court in *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733 (1875), which are cited by respondent (Respondent's brief, pt. 1, pp. 19, 20) to show the practical impossibility of selling or mortgaging lands burdened by Indian occu-

pancy rights, have not been located, but the opinion in question, as read by petitioner, demonstrates precisely the opposite. In the *Leavenworth* case this Court pointed out (at p. 744) that grant lands burdened by Indian occupancy would be practically worthless *unless the Government intended to extinguish the Indian title,* and that if the Government wished to do this it would presumably include in the granting act direct promissory language similar to that used in the 1866 act granting lands to the respondent's predecessor. The Court went on to declare:

> * * * The Congress that made this grant made one, eight months before, to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and of other roads connecting therewith; in which it agreed to extinguish as rapidly as possible the Indian title, for the benefit of the companies.[22] This was necessary, although their roads ran through territory occupied by wild tribes; but this passed through a reservation secured by treaty, and occupied by Indians at least partially civilized. A transfer of any part of it would be wrong; and, as the act does not mention it, there is no reason to suppose

[22] The language referred to is found in section 2 of the act of July 1, 1862 (12 Stat. 489, 491–492), reading as follows: "The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

> that Congress, in making the grant, contemplated the extinction of the Indian title to all. * * * [At p. 744.]

Thus, far from lending any support whatever to respondent's argument, the *Leavenworth* case actually gives complete support to the position of petitioner, not only with respect to the interpretation of the granting act in the case at bar but also with respect to the practical value of even an encumbered fee where the Federal Government has undertaken to extinguish Indian title. Finally, the language quoted affords a clear statement of Congressional policy as to the necessity of affirmative action to extinguish the aboriginal occupancy rights of nonreservation Indians in the Mexican cession area.

Thus, even if all (and not only a minor fraction) of the railroad grant lands of respondent's predecessor had been within the Walapai country and even if all such lands had been burdened by an Indian possessory right, it would not follow that the railroad had been imposed upon by the Federal Government or that Congress was wasting its time when it dealt with the railroad title to the lands in question and authorized mortgages, exchanges, and various other transactions.

There is a further fallacy in the respondent's contention that Congressional legislation affecting the railroad must be interpreted as extinguishing all Walapai occupancy rights. Respondent assumes, in this argument, that the entire area set

forth in petitioner's complaint was actually possessed and occupied by the Walapai Indians and that if the Walapai had any occupancy rights at all, then in this entire area the railroad was without a beneficial interest in any of its grant lands. This, however, is a misuse of the doctrine that a complaint must be accepted as true for purposes of determining its sufficiency. Actually, it is possible that the Walapai Tribe will be able to sustain its claims only to modest portions of the area described in the complaint. Should this be the case, the railroad will have received, in addition to unencumbered title over all of its grant lands outside the area of the complaint, an equally unencumbered title to some large or small portions of the lands within that area. Since this involves a question of fact that has never been decided, it was perfectly reasonable for Congress and the administrative authorities to treat the railroad grant lands within the area now in question as involving not only a fee title, which was valuable even if encumbered, but also perhaps an unencumbered fee title to an undetermined portion of these lands not actually occupied by the Walapai Indians.

Thus at every essential point respondent's argument that Congress, if it acted in good faith, must have denied *all* Walapai occupancy rights in the area now claimed, breaks down.

Certain of the considerations advanced by respondent in the course of this argument may be

relevant, if this case comes to trial, to the question of what standards of proof are to be required for the establishment of Indian occupancy. These considerations, however, are premature at the present stage of proceedings.

Respondent seeks to give the impression that from 1866 to the institution of this suit in 1937 the possessory rights of the respondent and its predecessor were never challenged and that this long delay reflects the tenuous character of the claims which the Government now advances on behalf of the Walapai Tribe (Respondent's brief, pt. 1, pp. 5, 23). The facts with respect to the responsibility for the late date of this litigation are quite different.

Until very recently the respondent made no attempt to interfere with the actual possession of the lands in question by the Indians. That possession, as stated in the complaint, has continued from time immemorial to the date of the institution of the suit (R. 4–19). The respondent itself asks this Court to take judicial notice of a communication from the Secretary of the Interior to the Chairman of the Senate Committee on Indian Affairs urging enactment of legislation for "exchanges of Government and privately owned lands in the Walapai Indian Reservation" (Respondent's appendix, pp. 104–106). This letter points out that until the railroad grant lands were first surveyed, shortly before the date of the letter, December 6, 1923, the railroad grant lands were be-

ing leased by the Government and the rentals being credited to the Indians.

> * * * Before the odd-numbered sections had been actually identified by a survey and marked on the ground, the Department held that it had authority to lease as grazing districts the unsurveyed lands within the reservation and apply the rental for the benefit of the Indians; and the Indians otherwise have had practically the free and unrestricted use of their reservations [illegible] had been actually identified by a survey changed, and the railroad company, through its attorneys, are alleging that the Indians are committing waste upon the company's lands by felling and removing the timber, and by grazing lands for which the company has received no benefit and given no authority. This Department has been asked to make an investigation to ascertain the extent of these unlawful acts, and it has been stated to us that the company would like a settlement of these difficulties without resorting to suit. * * * [This letter is quoted from the original, which differs in minor respects from respondent's appendix, p. 105.]

The attempt to negotiate such a settlement brought to a head the issues which are presented to this Court in the current litigation.

For whatever delay has occurred in the presentation of these issues to the courts, primary responsibility, therefore, lies not with the petitioner but with the railroad, which, only within the past

few years, has sought to upset an occupancy that has continued undisturbed for many centuries before and for many decades after the alleged claim of the railroad to possession of these lands first arose. Possibly some small share of blame may be ascribed to the Government for failing, years ago, to foresee that the respondent would claim not only title to the reservation lands but the right to eject the Indians therefrom. Possibly, too, some slight share of responsibility for delay in the presentation of these issues may be ascribed to the unfortunate decision of this Court in *United States* v. *Joseph*, 94 U. S. 614 (1876), which, until overruled implicitly in *United States* v. *Sandoval*, 231 U. S. 28 (1913), and explicitly in *United States* v. *Chavez*, 290 U. S. 357 (1933) (see Petitioner's main brief, pp. 31–32), gave support to a belief widely current in the Mexican Cession area that the United States had a lesser degree of responsibility for the protection of nontreaty Indians in that area who had enjoyed civil rights under the Mexican Government than it had to Indians in other parts of the country and that this lesser responsibility did not include the protection of land claims. However this may be, respondent cannot escape primary responsibility for fixing the date of this litigation by refraining, until very recently, from committing the acts of trespass which are the gravamen of the present complaint (R. 8, 19).

B. NONE OF THE MATERIAL UPON WHICH RESPONDENT RELIES INDICATES AN EXTINGUISHMENT OF WALAPAI OCCUPANCY RIGHTS PRIOR TO 1866.

The railroad contends that legislation and administrative conduct prior to the granting act of July 27, 1866, extinguished Walapai rights or failed to recognize them so that the lands were free from Walapai claims when the granting act was passed and therefore the railroad's title was free from Indian occupancy rights when the granting act was passed. That there is no need for affirmative recognition of occupancy rights has been elsewhere argued by the Government (Petitioner's brief, pp. 27–29; Reply Brief, pp. 21–41).

Despite the charge of the railroad that the Government has ignored pertinent legislation and administration prior to 1866, the Government has already discussed all of these matters.[23]

The respondent claims that the act of March 3, 1851 (9 Stat. 631), and the failure to ratify negotiations with California Indians for treaties,

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[23] The preemption act of September 4, 1841 (5 Stat. 453), Petitioner's main brief, pages 40–42; the Treaty of Guadalupe Hidalgo (9 Stat. 922), *ibid.*, pages 48, 60; the act of September 9, 1850 (9 Stat. 446, 452), organizing New Mexico Territory and extending the trade and intercourse acts to that Territory, pages 38–40; the act of March 3, 1851 (9 Stat. 631), to ascertain and settle private land claims in California, *ibid.*, page 84; and the act of July 22, 1854 (10 Stat. 308), establishing the office of surveyor general in New Mexico, Kansas, and Nebraska, *ibid.*, pages 40, 41, and 46.

establish that all rights in the entire Mexican Cession were abolished and that the same land policy which was adopted for California was effective in Arizona (Respondent's brief, pt. 1, pp. 40–42). Arguments from the California situation are of little value because the law governing the protection of Indian rights was peculiar to that State. *Barker* v. *Harvey*, 181 U. S. 481 (1901); Goodrich, The Legal Status of the California Indians (1926), 14 Calif. L. Rev. 83, 157, and Petitioner's brief, p. 84. The act of March 3, 1851 (9 Stat. 631), relating to California specifically directed the Commissioner to report on Indian land claims (sec. 16) and provided that all claims not filed within the period specified in the act were abandoned. But the act of March 3, 1891 (26 Stat. 854), to establish a court of private land claims for Arizona specifically prohibited that court from interfering with Indian claims.

All that the respondent shows, in its discussion of the unratified California treaties, is that in California the President and the Senate, whose joint action might have formulated a national policy, were unable to agree on any policy at all (Respondent's brief, pt. 1, p. 41). Respondent's argument on Indian treaties in the Mexican Cession area shows only that out of a long series of Indian treaties by which the United States secured the extinguishment of aboriginal occupancy rights in a large part of the Mexican Cession area, one treaty, with the Tabeguache Band of Utes, pro-

vided that the Band would retain only those rights (presumably rights of occupancy but not of alienation) enjoyed under Mexican law (and not, as Respondent's brief erroneously states at page 44, that the Government would not "recognize any rights in the Indians").

It is next said by the railroad (Respondent's brief, pt. 1, p. 40) that the act of September 9, 1850 (9 Stat. 446), creating a Territorial government for New Mexico (Arizona), and granting to that Territory two sections in each township for school purposes, extinguished Walapai rights. That such a grant of school lands does not extinguish Indian rights has been held by this Court in two cases. *Beecher* v. *Wetherby*, 95 U. S. 517 (1877), *Wisconsin* v. *Hitchcock*, 201 U. S. 202 (1906). The assertion in Respondent's brief, pages 61 and 63, that the act of March 3, 1853 (10 Stat. 244), expressly declared that the even-numbered sections in Arizona were public lands is misleading because the Indian Intercourse Act of June 30, 1834 (4 Stat. 729), and the preemption act of September 4, 1841 (5 Stat. 453), and the instructions of the General Land Office (Reply Brief, pp. 48–49), all prohibited settlement upon or the preemption of lands occupied by Indians. See *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 70 (1886).

The argument (Respondent's brief, pt. 1, pp. 49–53) that the provision in the appropriation act

of March 3, 1865 (13 Stat. 541, 559), authorizing the establishment of a reservation for the Indians of the Colorado River and its tributaries, automatically wiped out the rights of the Walapai Tribe in all other areas has elsewhere been answered (Petitioner's main brief, pp. 42–45; reply brief, p. 31, *supra;* and see pp. 73–74, *infra*), and it need only be added that there is no logical or legal merit in the respondent's argument that "The use by Congress of the term 'reservation' is conclusive that the Walapai had no recognized right elsewhere * * *." (Respondent's brief, pt. 1, p. 49.) In fact this Court has recently held that the use or non-use by Congress of the term "reservation" proves nothing at all. *United States* v. *McGowan*, 302 U. S. 535 (1938).

That General Kearney incorporated the Pueblo Indians (Respondent's brief, pt. 1, p. 40); that the Government sent one Captain Mowry to investigate titles in Arizona (Respondent's brief, pt. 1, p. 44); that Congress reserved to itself the right to confirm Spanish and Mexican grants until 1891 (Respondent's brief, pt. 1, p. 44); that the United States established land offices in Arizona, began surveys, and instructed the surveyor general what work he was to do (Respondent's brief, pt. 1, pp. 42, 45), did not deny or extinguish any Walapai rights, as they are asserted to have done. Indeed, these matters are completely irrelevant to the question of whether Walapai rights were ex-

tinguished prior to 1866. Thus, neither Congress nor the Executive, prior to 1866, extinguished any Walapai rights and those rights existed when the granting act of 1866 was passed (see also Petitioner's brief, pp. 47–59, 80–82, 85–87).

C. THE 1866 GRANTING ACT DOES NOT EXTINGUISH ANY SUCH RIGHTS.

The Government has shown that the act of July 27, 1866 (14 Stat. 292), safeguarded and did not extinguish Walapai rights of occupancy (see Petitioner's brief, pp. 13–15; reply brief, pp. 11–21).

D. SUCH RIGHTS HAVE NOT BEEN EXTINGUISHED SINCE THE 1866 GRANTING ACT.

If the Walapai Tribe had a right of occupancy which was not extinguished before July 27, 1866, or by the granting act of that date, it is necessary, in order for the railroad to succeed upon its argument that the Walapai rights were extinguished, that it point to a specific statute which modified the granting act of July 27, 1866, or show that the Walapai rights were extinguished in accordance with the provisions of the granting act of July 27, 1866, requiring, so far as the railroad is concerned, voluntary cession by the Indians. Aside from a vague suggestion that the Walapai voluntarily exchanged their occupancy rights in their homeland for a right to live in the Colorado River Reservation (Respondent's brief, pt. 1, pp. 49–51; *cf.* Peti-

tioner's brief, pp. 42–44, 98–99), the respondent shows no voluntary or other cession by the Walapai. In fact, the Indians still occupy the land. Nor has the respondent pointed to a single statutory enactment which even vaguely hints that the Walapai rights were extinguished.

The act of April 20, 1871 (17 Stat. 19), authorizing the railroad to mortgage its property, the mortgage itself, and the act of March 3, 1897 (29 Stat. 622), authorizing the purchase of the railroad at a foreclosure sale, do not deny or extinguish any Indian rights. The last-mentioned act admonished the purchasers at the foreclosure sale that they would get by their purchase only what the railroad had. Ownership of lands "is not strengthened by giving a mortgage upon them." *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733, 753 (1875).

It is completely irrelevant to the issues in this case that five cases involving different problems under the grant to the respondent have been before the Court (Respondent's brief, pt. 1, pp. 20, 21); that claims by some tribes against the Government for money as damages have been denied (Respondent's brief, pt. 1, pp. 33, 34), and that the President vetoed a bill which would have appropriated money for California Indians (Respondent's brief, pt. 1, p. 34).

The respondent can obtain no comfort from its quotations from Donaldson, The Public Domain

(Respondent's brief, pt. 1, pp. 41, 42), that California and Arizona became public domain because Donaldson makes the same statement about all other States then in existence excepting Vermont, Kentucky, Maine, Texas, and West Virginia (Donaldson, *ibid.*, 420–458), and what he meant was that the Government had the power to grant title. To draw from Donaldson's statement about Arizona the inference that Indian occupancy rights had been extinguished would require the conclusion that there are not now and never have been any Indian occupancy rights anywhere in the United States.

The act of July 10, 1886 (24 Stat. 143), providing that the railroad's grant lands should be taxable after survey applied to all railroad grants and did not refer to Indian occupancy rights. A mere reading of that statute refutes the railroad's argument that Congress by said act intended to extinguish Indian rights. The act of July 31, 1876 (19 Stat. 102, 121), requiring all railroads to pay the cost of surveying their lands had nothing to do with Indian rights. The railroad's argument that these statutes extinguished Indian rights (Respondent's brief, pt. 1, p. 62), would lead to the conclusion that all lands granted to all railroads throughout the United States were by virtue of the grants freed from Indian occupancy rights.

The Taylor Grazing Act[24] (48 Stat. 1269, 49 Stat. 1976) and the Transportation Act of 1940 (act of September 18, 1940, 54 Stat. 898), have nothing to do with this case nor can the railroad gain any comfort from the map shown facing page 48 of its brief for that map designates all of the Walapai Reservation, both the odd-numbered and the even-numbered sections, as an Indian reservation.

Finally, respondent contends that the Secretary of the Interior has conclusively adjudicated the railroad's right to the land and that, therefore, even if the Walapai Indians had a right of occupancy in the land that right was extinguished (Respondent's brief, pt. 1, pp. 68–71). This is erroneous. Insofar as the adjudication consists in the issuance of patents, it would not relate to the lands in the first cause of action since they were never patented, nor to so much of the lands covered by the second cause of action as, according to the respondent's brief (pt. 1, p. 68), were not patented. Insofar as it refers to correspondence within the Department in 1919 and 1920, concerning the payment for the cost of the survey of the reservation (Respondent's brief, pt. 1, p. 71), the decision of the Department was not directed to or

[24] The Taylor Grazing Act does not apply to any of the lands in controversy, since the title to such lands is in the respondent. Furthermore the act permits recognition of preferential grazing rights of Indians living within a grazing district. 56 I. D. 308 (1938).

conclusive of the questions presented in this case. The question before the Secretary of the Interior in 1919 was whether the Government's share of the cost of survey of the Walapai Reservation should be paid from the continuing appropriation for surveying within railroad land grants or the regular annual appropriation for surveying and allotting Indian reservations. The Secretary determined, in the letter of October 2, 1919, cited by the respondent, that the cost should be borne from the regular appropriation for surveying Indian reservations and, with respect to ownership, decided only that the lands in Indian occupancy were not excluded from the grant and that the grant to the railroad was not nullified by the subsequent reservation. Petitioner's contentions are not based on the establishment of the Walapai Reservation or on the exclusion of the land in Indian occupancy from the grant to the railroad. The Interior Department has not, either in the correspondence referred to by the respondent or at any later time, decided the question whether the grant to the railroad conveyed the title subject to the Indian right of occupancy. The respondent, therefore, misstates the decision of the Secretary of the Interior when it asserts (Respondent's brief, pt. 1, p. 71) that the Secretary of the Interior determined the "beneficial title" to be in the respondent.

However, even if the Department had made such a determination adversely to the Indians, the determination would not be conclusive, since the Department did not have power to adjudicate that the railroad had such title free of the encumbrance of Indian occupancy.

In *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733 (1875), the Secretary of the Interior had furnished certified lists of the land which passed under the grant involved in that case and patents had been issued to the railroad at the time the United States instituted its action. Yet, this did not prevent this Court from protecting the Indian right of occupancy in the *Leavenworth* case.

In *Cramer* v. *United States*, 261 U. S. 219, 234 (1923), this question was expressly decided adversely to the railroad's contention. In the *Cramer* case this court held that the granting act of July 25, 1866 (14 Stat. 239), which did not contain any language protecting Indian occupancy, did not convey title to the railroad grantee to land occupied by Indians. The railroad contended in the *Cramer* case, as the railroad contends in this case, that the issuance of patents and the additional fact that the United States had taken a lease of the land involved had adjudicated conclusively the right of the railroad to the land and that the Government was estopped from establishing Indian rights in such land. This court rejected the rail-

road's view in the *Cramer* case as it should reject the railroad's view in this case, and said, at p. 234:

> Neither is the Government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights.

Therefore, the mere issuance of patents and the other administrative conduct referred to by the railroad did not adjudicate that the railroad had a right to the land freed from the Walapai right of occupancy.

Point 4

IN SO FAR AS THE ARGUMENTS OF THE RESPONDENT REST UPON A DENIAL OF FACTUAL ALLEGATIONS OF THE COMPLAINT, THEY ARE IRRELEVANT TO THE QUESTION OF THE SUFFICIENCY OF THE COMPLAINT.

Respondent has presented to this Court and to the courts below a detailed picture of Walapai history designed to show that there was no Walapai Tribe (Respondent's brief, pt. 1, p. 107; R.

30, 133–135), that the Walapai Indians never maintained possession of any defined area for any considerable period of time (Respondent's brief, pt. 1, p. 39; pt. 2, pp. 7–8, 12; R. 30, 37), that the Walapai Tribe (which, according to respondent, did not exist) "agreed" to a surrender of its ancestral homeland (Respondent's brief, pt. 1, pp. 51, 107; R. 69, 71, 192–195), that the Walapai Indians were "river Indians" and therefore entitled to share in the "Colorado River Reservation" even though the act of Congress establishing the reservation did not mention the Walapai Indians (Respondent's brief, pt. 1, pp. 36–37, 63, 101; R. 193, 205, 208), that the Walapai Tribe was removed in 1874 from the territory involved in this litigation (Respondent's brief, pt. 1, pp. 4, 54; R. 211), and that subsequently this territory was taken up by white men to the exclusion of the Walapai (Respondent's brief, pt. 1, pp. 49–50, 56–57). Each of these allegations is in direct conflict with allegations of the complaint which petitioner hopes to prove if it is permitted a trial. Although the factual assertions which respondent has made in the courts below and repeats in this Court were in large part incorporated in the supplemental order of the District Court as "findings" (R. 191–196) and are so referred to by the respondent (Respondent's brief, pt. 1, pp. 36–37), respondent now says that its allegations on these various questions of fact are "irrelevancies" (*ibid.*, p. 13) which had no effect upon the decision of the District

Court and are immaterial to the issues before this Court (*ibid.*, pp. 3–4, 13, 104). Respondent thus does not controvert the position taken by the petitioner (main brief, pp. 92–104) that if the District Court based its conclusion upon "findings" or assumptions of fact in conflict with the allegations of the complaint, then its decision must be reversed for that reason. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292 (1937); *United States* v. *Mackey*, 216 Fed. 126 (C. C. A. 8th, 1914).

Accepting the respondent's concession that the factual allegations of the complaint are to be deemed true, petitioner submits that all of the arguments of the respondent which rest upon a denial of those allegations should be eliminated from the case, as being irrelevant to the only question before this Court, that of the sufficiency of the complaint. The extent of such an elimination is perhaps not recognized by the respondent. The fact is that nearly every argument in the respondent's brief assumes the falsity of one or more factual allegations of the complaint and falls to the ground without the support of such factual assumptions.

Essentially, respondent makes two contentions: (1) that the Walapai had no possessory rights in 1866; and (2) that whatever rights they then had were subsequently extinguished.

The first of these contentions involves an argument on Spanish and Mexican law before 1848 and

an argument on the law of the United States between 1848 and 1866.

The argument on Spanish and Mexican law involves two assertions: (a) that Spanish and Mexican law did not concede possessory rights in land to those Indians classified as "denizens of forests" who wandered over a territory not "defined" or "identifiable" and did not compose an "organized" tribal community; and (b) that in fact the Walapai Indians were "denizens of forests" (Respondent's brief, pt. 2, p. 12) who were not "an organized community" capable of acquiring by prescription (*ibid.*, pp. 7–8), and whose occupancy of land (described in the complaint as "exclusive" and continuous "from time immemorial" within a well-defined area (R. 4–9, 11–16)) amounted to "the ranging of a wandering tribe over territory neither defined by limits nor otherwise clearly identifiable" (Respondent's brief, pt. 2, p. 7).[5] The respondent's argument

[5] Respondent, in part 2 of its brief, distinguishes the factual situation of the Tallapuche Indians, whose prior rights were recognized in a treaty cited by petitioner (Petitioner's main brief, p. 71), on the ground that the Tallapuche Indians "had never been conquered" (Respondent's brief, part 2, p. 5) and, further, that the Tallapuche Indians were "an organized and settled tribe" (*ibid.*). The same may be said of the Walapai Indians. There is no ground for supposing that they had even been visited, except by one nomadic missionary, before the Mexican cession, that they had ever been actually conquered by Spain or Mexico, or that they were less "organized" or less "settled" than the Tallapuche Indians. (See Petitioner's Appendix, pp. 23–42.)

as to lack of possessory rights under Spanish and Mexican law is thus squarely based upon assumptions of fact inconsistent with the complaint, and must therefore be rejected, if the allegations of the complaint are to be deemed true for purposes of this proceeding.

The respondent's second argument designed to show that the Walapai Tribe had no possessory rights at the time of the Granting Act is based on the course of Congressional legislation from 1848 to 1866. Apart from a vague argument as to Federal policy, which is elsewhere considered (pp. 45–58), the only specific argument offered by respondent with respect to any legislation enacted in this period is the argument that the Walapai Indians were "Indians of the Colorado River" and were therefore comprised in the groups for which the Colorado River Reservation was established in 1865. From this factual assumption as to the location and habits of the Walapai Indians, respondent reaches the conclusion that the possessory rights of these Indians were extinguished, by assuming as a matter of law that the establishment of a reservation for Indians automatically wipes out all prior possessory rights in other areas. The soundness of this legal proposition petitioner has elsewhere challenged (main brief, pp. 42–46). The factual assumption as to the habits and location of the Walapai Indians is not justified in the present state of the record.

In fact, so far as any inference is possible from the allegations of the complaint, a considerable portion of the Walapai country actually occupied by the Walapai Tribe (although technically within the Colorado River watershed, as is most of the Southwest) is far removed from the Colorado River or any of its tributaries. Thus, if the factual assumptions underlying the second argument of the respondent are eliminated, the argument falls.

The respondent's brief (pt. 1, pp. 51, 107) and the opinion of the Circuit Court of Appeals (R. 208) seek to buttress the view that the Colorado River Reservation was intended for the entire Walapai Tribe by asserting that the Walapai Tribe actually agreed to remove to that reservation and in that connection surrendered all land claims in other areas. This assertion is contrary to the express allegation of the complaint that the tribe "never ceded the said lands, or any part thereof" (R. 8) and that the claim of the tribe "has not been extinguished by the voluntary cession thereof" (R. 19). This buttressing argument, therefore, is as much dependent upon a factual allegation controverting the complaint as is the argument concerning the location of the Walapai Tribe on the banks of the Colorado River.

In its final argument, respondent urges that whatever occupancy rights the Walapai Indians had in 1866 were subsequently extinguished. This argument rests chiefly upon "the incontrovertible

fact [26] that the Walapai were forcibly removed in 1874 to the reservation provided for them in 1865 by Congress" (Respondent's brief, pt. 1, p. 4) and that thereafter the country formerly occupied by them was taken up by white settlers. Thus, in the respondent's account, "the country formerly occupied by them was settled up" (*ibid.*, p. 56), there was "the old story of white penetration crowding out Indian possession" (*ibid.*, p. 56), and finally, "After 1875, all the water and grass was taken by white stockmen * * *. The Walapai worked for settlers and the railroads while not 'lying around the railroad stations and small towns' " (*ibid.*, p. 57). All of these factual allegations and assumptions by the respondent, underlying its entire argument on abandonment, are in conflict with factual allegations of the complaint, and if the factual allegations of the complaint therefore are accepted as true the entire substance of the respondent's argument as to the extinguishment of rights enjoyed by the Walapai Tribe in 1866 vanishes into thin air.

Thus, without the benefit of factual assumptions inconsistent with the allegations of the complaint, the three principal arguments of the respondent fail. On the other hand, if these factual assump-

[26] The "incontrovertible fact" is controverted by the complaint which alleges that the lands in suit were continuously occupied by the Walapai Indians despite this alleged removal. The actual fact seems to be that only a small part of the Walapai Tribe was even temporarily removed in 1874. See petitioner's Appendix, pp. 45-49.

tions are to be dignified as "findings of fact" based upon "judicial notice," then petitioner submits that this procedure, depriving the Government of a trial upon the issues of the case, constitutes reversible error. When similar procedure was used to defend a suit brought by the United States to quiet title to the tribal land of another Indian tribe, the Circuit Court of Appeals for the Eighth Circuit reversed the decision of the trial court dismissing the complaint. The following quotation is revealing:

> * * * The United States was not obliged to deraign the title of the Creek Nation in its bill, but could allege the ultimate fact of ownership without more. The demurrers treated as motions to dismiss, admitted the allegation as to ownership in paragraph three above quoted. Notwithstanding this, the court dismissed the bill for the reason that the Creek Nation had no title to the land in controversy. As the only record before the court was the demurrers, and the bill, it is difficult to see how this result could be brought about. The United States has never at any time had an opportunity to show by evidence that the allegations contained in paragraph 3 of the bill were true. On the contrary, they have been turned out of court by a finding that the Creek Nation had no right or interest in the land, and this not upon any showing of the United States, but upon a case gathered from the world at large. [*United States* v. *Mackey*, 216 Fed. 126, 127–128 (1914).]

Respectfully submitted.

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The Solicitor General authorizes the filing of this brief.

CHARLES FAHY,
Acting Solicitor General.

OCTOBER 22, 1941.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 717

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA,

Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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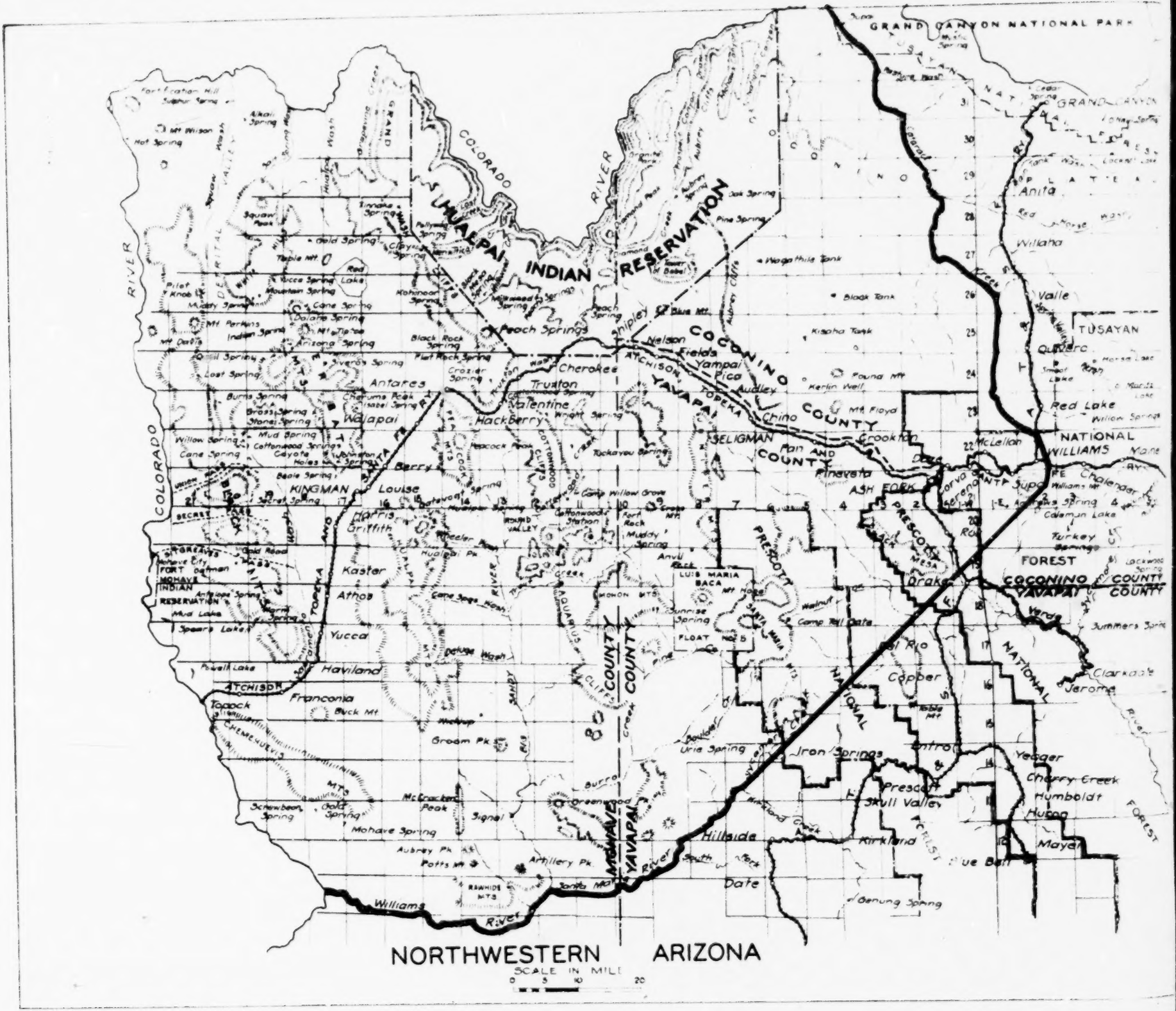
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Triple Mt
Squaw Peak
Pilot Knob
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Mt Hope
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SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

INTRODUCTORY STATEMENT.

Petitioner, styling the action a "suit to quiet title and for an accounting," (R. 2) alleged:

> In the first cause of action, that it is the owner of all lands within the Walapai Indian Reservation and that Respondent claims the odd-numbered sections (R. 3, 5-7).
>
> In the second cause of action, that it is the owner of adjacent territory (R. 10), bounded on the west and north by the Colorado River, and on the east and south by the heavy line on the map hereto attached, excluding the Walapai and Mohave reservations (R. 11-14). Patented odd-numbered sections are claimed by Respondent; and the patents are sought to be set side (R. 19), with accounting for sales and profits arisin from use (R. 20).

Respondent moved to dismiss (R. 24-26); and its motion was supported by the theory (R. 24, 84) that pleadings judicially known to be untrue are not well pleaded, *Arizona* v. *California*, 283 U. S. 423, *Nev-Cal Electric Securities Co.* v. *Imperial Irrigation District*, 85 F. (2d) 886, 904-6 (certiorari denied, 300 U. S. 662). In the manner described as appropriate by this Court, *Ohio Bell Tel. Co.* v. *Commission*, 301 U. S. 292, the Trial Court's attention was directed to matters of public and historic record (R. 26-189). The Trial Court dismissed the case (R. 191-6), and the Circuit Court of Appeals affirmed (R. 204-14, 114 F. (2d) 420).

Within the exterior bounds of the lands in issue is about one-eighth of Arizona, and such towns as Williams, Ash Fork, and Seligman. Possession in fact of this vast area, and exclusive possessory right, are alleged on behalf of Indians numbering about four hundred and fifty.[1]

Petitioner conceded below that the right of the United States to the lands in question was originally absolute and that Walapai rights depended upon the laws and policy of the United States.[2] In the Trial Court, Petitioner con-

1. Lieutenant Colonel Brayton's census of 1888 showed 646, living at various places, working for white people, a few cultivating gardens (*Walapai Papers*, 165-8). In 1924 the Board of Indian Commissioners reported that the "population of 440 Walapai Indians, with the exception of a few families, live in towns scattered along the Santa Fe Railroad for a distance of 100 miles. * * *" (Idem, 204.) The same Board reported in 1928: "Principally because of the demand for unskilled labor, the Indians are allowed to remain in their nondescript camps on the edges of town; otherwise the whites undoubtedly would have forced these unprepossessing squatters away from the neighborhood." (Idem, 208.)

2. Finding 2 of the Trial Court reads in part:

"The Walapai were of the savage tribes referred to in the Treaty of Guadalupe Hidalgo, 9 Stat. 922. It is not claimed they were granted lands by Spain or Mexico. Sources and authorities referred to by defendant in support of its points IB and ID, and the sources and authorities referred to in appendix to defendant's original brief, here referred to and made a part hereof, are conclusive that these Indians had no rights to the land in controversy under the laws of Spain and Mexico; and from the brief and argument of plaintiff it is clear that it does not and cannot controvert this point." (R. 192.)

The Circuit Court says:

"Since it is conceded that the title of the United States was absolute, except in certain cases of specific grants, * * *" (R. 207.)

tended for a trial only to enable it to introduce evidence on the issue of the extent and nature of Walapai tribal organization and tribal occupancy; and both the Trial and Circuit Courts held that testimony of such nature could not possibly affect the result (R. 195-6, 212).[3]

The particular background of this litigation pertains almost exclusively to the first cause of action. The discussion since 1919 (Petition, p. 4) related to lands in the first cause; the Senate Committee hearings dealt with those lands (*Walapai Papers*,[4] 239-354); and these proceedings, held in July, 1931, were followed in September and November, 1931, by opinions of the Solicitor for the Interior Department and the Assistant Attorney General (W. P., 318-27) sustaining Respondent's claims. On June 13, 1932, the Senate tabled a resolution introduced by Senator Frazier which would have directed delay in consummation of exchange of first cause lands under the Act of February 20, 1925, 43 Stat. 954;[5] whereupon, on June 17, 1932, Senator Frazier wrote the letter (W. P., 356) so heavily relied upon in explanation of this suit (Petition, pp. 5, 20). The letter relates to no second cause lands; it refers to evidence which is said to indicate that prior to 1866 and March 12, 1872, the Walapai "were in the actual possession and occupancy of *certain of the areas*

3. Official documents referred to in the record are replete with information concerning the Walapai from the earliest times of white contact. Such information is judicially known by the courts. *United States* v. *Sandoval*, 231 U. S. 28. *Lake* v. *United States*, 35 Ct. Cls. 15.

4. References to *Walapai Papers* will hereinafter be abbreviated to W. P.

5. The resolution read:

"Resolved: That the Secretary of the Interior is hereby requested to delay final consummation of the proposed exchange of lands within the Hualpai Indian Reservation with The Atchison, Topeka and Santa Fe Railway Company pursuant to the Act entitled 'An Act to Provide for Exchanges of Government and Privately Owned Lands in the Hualpai Indian Reservation, Arizona,' dated February 20, 1925, pending further investigation of the proposal by the Senate Committee of Indian Affairs and the final disposition until the 72nd Congress has such additional legislation as the committee may recommend in connection therewith." (75 Cong. Rec., Part 14, p. 15175.)

later embraced in their reservation; and that *this Indian title was never extinguished by voluntary cession.* • • •"

Since the field of Indian relations is essentially political, the attitude of the Department of Justice in refusing to participate in this proceeding assumes significance.[6] The position of the United States was recently phrased, and sustained by the Court of Claims, as follows:

> "• • • • the Government never having recognized that these tribes were the possessors of title in any degree to the land now claimed by them, they have no right thereto which can be litigated in this or any other court; that whether or not an Indian tribe has title to any particular section is dependent in the first instance upon sovereign recognition and that until that recognition has been accorded by the sovereign the entire matter rests in the realm of politics and is not determinable in a court of law or equity.'" *Duwamish, et al. Indians* v. *United States*, 79 Ct. Cls. 530, 597; also 606-7, certiorari denied, 295 U. S. 755. See also *Coos Bay Indian Tribe, et al.* v. *The United States*, 87 Ct. Cls. 143, 152-3, certiorari denied, 306 U. S. 653; and Record, pp. 145-190.

This position of the Department of Justice is the recorded position of the Chief Executive with respect to the lands of the Mexican Cession (R. 99-109).[7]

Recent Development Affecting First Cause Lands.

Since the opinion of the Circuit Court of Appeals was rendered, Respondent has, pursuant to Section 321(b) of the Transportation Act of 1940, filed a release of all lands

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6. In his motion herein for extension of time, the Solicitor General recites that "the Department of Justice, in opposing Indian claim suits, has taken the opposite position in the Court of Claims that there is no Indian right of aboriginal possession which will ground a claim against the United States." (R. 215-216.)

7. The opinion of Interior Department Solicitor Mr. Margold, 54 I. D. 359, 370, reads in part:

> "It follows that the question of the appropriate manner of protecting the Papagos in their possession was, and still is, a matter exclusively of political cognizance. • • • The present measure of the legal rights of the Papagos is the Executive order of February 1, 1917, as modified by the Act of February 21, 1931."

involved in the first cause of action, has received a letter from the First Assistant Secretary of the Interior requesting an Indenture of further assurance, and has furnished the document requested. A certified copy of the documents and correspondence is being lodged with the Clerk of the Court; and an uncertified copy is printed as an Appendix to this brief, with copy of the section of the Transportation Act of 1940 referred to.

Question Presented.

The issue is whether there can be an Indian tribal right to Arizona lands, not within a reservation, such as will prevail against the purchaser of the title of the United States' grantee.

REASONS FOR DENYING THE WRIT.

I. The Court Below Applied Principles of Law Settled Many Times by Direct Decision of This and Inferior Courts.

The Court below in effect held that, though the political authorities had once customarily created Indian possessory rights in other sections coextensive with possession, they had not done so in the particular lands here in question; also, that if a mere possessory right had been created, the political policy of opening the country to settlement and development and assigning Indians to reservations and controlling them in the interest of that policy, the while disposing of the Indians' ancient hunting grounds, had destroyed that right. These holdings are in strict accord with the decisions of this Court and the lower Federal Courts.

In *Barker* v. *Harvey*, 181 U. S. 481, 492, this Court held:

> "Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government; that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians."

See also, *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472, and briefs therein. Political recognition is necessary to the creation of legal Indian possessory right, *Barker* v. *Harvey, supra*, *Hayt* v. *United States*, 38 Ct. Cls. 455, *Duwamish et al. Indians* v. *United States*, 79 Ct. Cls. 530, certiorari denied, 295 U. S. 755, *Coos Bay Indian Tribe et al.* v. *The United States*, 87 Ct. Cls. 143, 152-3, certiorari denied, 306 U. S. 653; so withdrawal of recognition evidenced by a grant of lands, inconsistent with Indian right, *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, *Conley* v. *Ballinger*, 216 U. S. 84, *Super* v. *Work*, 3 F. (2d) 90, 271 U. S. 643, by a crowding out of Indians and granting of titles to white people, *Johnson* v. *McIntosh*, 8 Wheat. 543, or even by long acquiescence by Congress and the Executive in the possession of others, *Shoshone Tribe* v. *United States*, 299 U. S. 476, 495-6, *United States* v. *Creek Nation*, 295 U. S. 103, 110, or otherwise, destroys Indian right. "Save to the extent that Congress may authorize, the Government's dealings with Indian tribes are not subject to judicial review." *Klamath Indians* v. *United States*, 296 U. S. 244, 255. "* * * the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, * * *." *Beecher* v. *Wetherby*, 95 U. S. 517, 525. "These are political, not judicial powers." *Sioux Indians* v. *United States*, 277 U. S. 424, 436. The titles created by political act are sacred in a court, but only because they have been so created, and only so long as they exist. The latest decision of this Court is *United States* v. *Northern Pacific Ry. Co., et al.*, pages 19-20, decided December 16, 1940, 85 L. Ed. 241, 255-6.

II. The Decision Below Is Not in Conflict With Any Decisions of This Court.

None of the cases cited by Petitioner is in conflict with the principles of law applied by the Court below. None of them holds that the United States was compelled to vest, or did vest, a legal title in all tribal Indians. None of them hold that because by statute or treaty Indians in one section have been given certain privileges or rights, Indians in other sections have the same or similar privileges or rights without being accorded them by political action.

A number of these cases dealt with rights of Indians established by treaties;[8] *Northern Pacific Ry. Co.* v. *Wismer*, 246 U. S. 283, decided the time and effect of creation of an executive order reservation; similarly, *Wilcox* v. *Jackson*, 13 Pet. 498, held that the establishment of certain reservations (for Indian, military, and lighthouse purposes) removed the reserved lands from the operation of the preemption laws.

In *Buttz* v. *Northern Pacific R. R. Co.*, 119 U. S. 55, Indian occupancy right was not in issue;[9] its existence was an apparently uncontested premise: "The land in controversy * * * was within what is known as Indian country." (p. 66.) This Court held that the railroad had the fee title under its grant. See also *United States* v. *Northern Pacific Ry. Co.*, decided December 16, 1940 (pp. 19-20), 85 L. Ed. 241, 255-6. The Indians in each of these cases had been parties to treaties to which other tribes and the United States were parties; and additionally they were in statutory "Indian Country."

8. *Worcester* v. *Georgia*, 6 Pet. 515; *Mitchel* v. *United States*, 9 Pet. 711; *United States* v. *Cook*, 19 Wall. 591; *Beecher* v. *Wetherby*, 95 U. S. 517; *Spalding* v. *Chandler*, 160 U. S. 394; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Leavenworth, Lawrence & Galveston R. R. Co.* v. *United States*, 92 U. S. 733.

9. The claim that "Indian right of occupancy was protected and enforced" by this decision (Petitioner's brief, 9, note 3) is not substantiated. The issue was between the railroad and a settler.

United States v. *Sandoval*, 231 U. S. 28, settled a question of the wardship of Indians who enjoyed property rights by confirmed Spanish grant; and neither *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, nor *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, turned upon such a question as is at issue here.

Cramer v. *United States*, 261 U. S. 219, held that an individual family of Indians who had abandoned all tribal relations pursuant to the policy of the government to break up the tribal status wherever possible and encourage individual agricultural pursuits, were protected against a railroad grant to the extent of approximately 150 acres actually cultivated and fenced but no further. This case has no relevance to tribal rights or claims.

Johnson v. *McIntosh*, 8 Wheat. 543 (1823), established, against a background of legislative acts, that a purported conveyance by Indian tribes northwest of the Ohio River was not effective to transfer a title of any kind. The Court wrote an extended essay searching for a universal principle behind legislative action; but it held that the rule of decision which "our own government has adopted in the particular case, and given us as the rule for our decision," (p. 572) must be applied. All nations of Europe "have asserted * * * the exclusive right of the discoverer to appropriate the lands occupied by the Indians." (p. 584.) The United States, as early as 1823, had exercised its conqueror's power as far west as the Mississippi (1) by the sword and (2) by permitting Indians to be crowded out and subsequently parceling out the lands. "It is not for the courts * * * to question the validity of this title, or to sustain one which is incompatible with it." (p. 589.)

Neither the foregoing nor any other decisions establish that Indian possession gives legal possessory rights which the sovereign has not seen fit to accord, and which prevail

after the sovereign has manifested its will that no such rights shall exist.

III. The Decision of the Court of Appeals Is Correct.

(A Reply to Petition, pp. 10-19.)

The miscellany offered by the Petitioner to show substantive error (petition, pp. 10-19) can not avoid the doctrine that whether or not the Walapai were to be given possessory rights, and if given them were to be allowed to retain them, were political questions. As respects much of the land acquired in the Louisiana and Florida purchases, Indian rights had been established by predecessor sovereigns. In the treaties of cession, established rights were agreed to be preserved, and were preserved. *Mitchel* v. *United States*, 9 Pet. 711, 754. The concession of property rights by the Spanish Monarch to the wild Indians was a thing "which had not before been done in any of his dominions." (Idem, p. 753.) The pretentions to land right which the Indians of the Louisiana Purchase had been able to force the Spanish Monarch to transmute into legal right were "pretensions that the Spanish government notoriously disregarded, further than a cautious policy required. [*Marsh* v. *Brooks*, 14 How. 513, 523 (1852).] It is well known, as conceded by Petitioner below, that in the lands of the Mexican Cession savage Indians (*Salvajes: Indios barbaros*) were never accorded land right. See *United States* v. *Lucero*, 1 N. Mex. 422, 430-431; *Haut* v. *The United States*, 38 Ct. Cls. 455, 461; R. 33-36, 99-109.

Even should it be assumed that the Walapai had possessory rights under Spanish and Mexican law, the question of what rights they were to have under United States rule was nevertheless political. The promise to respect property of Mexicans in ceded territory (Art. VIII, Treaty of Guadalupe Hidalgo, Appendix to Petitioner's brief, p. ii) was a covenant by the United States with Mexico. The

Congress was free to execute that covenant, condition its performance, or repudiate it, without interference from the Judiciary. Congress proceeded in its own time and way to determine what claims to Arizona land would, and what claims would not, be respected. *Lockhart* v. *Johnson*, 181 U. S. 516. What it did binds the courts. *Botiller* v. *Dominguez*, 130 U. S. 238, 247, *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 460.

The policy of Congress, continually manifest, was to open the entire Cession, except reservations, to white exploitation and development. Thus, the Act of 1854 (10 Stat. 308) offered every acre of Arizona land outside of reservations as a free gift to white settlers;[10] and the grant to the railroad and the policy toward Indians were all dictated by the purpose to Americanize the ceded territory. The policy toward Indians was to confine them to reservations set aside for their use, employing force if need be. Railroad construction was looked upon as an aid to the military in protecting white settlers and forcibly reconciling Indians to the policy of Congress (R. 45-49).

There can be no doubt that the 1865 reservation was created under this policy for the Walapai.[11] They were forced upon it and ran away. They were not forced back;

10. Petition, Appendix, pp. v-ix. This act offered all of Arizona (Sec. 2) with the exception of reservations (Sec. 4) as donations to settlers. All lands not taken under other provisions were made *subject to the operation of the Preemption Act* (Sec. 7).

Petitioner argues that since the Preemption law did not operate upon lands, the Indian title to which had not been extinguished, that the Act of 1854 in effect provided, not that lands would be *subject to the operation* of the Preemption law, but would *not be subject to its operation*, and gave Indians title to Arizona lands. This inverted reasoning (1) does violence to plain intent, (2) overlooks the contrast of Section 12, which made *subject to the operation* of the preemption law only Kansas and Nebraska lands *to which the Indian title has been or shall be extinguished*, and (3) ignores the main feature of the Act, the offer of all lands outside reservations as gifts to settlers.

11. Mr. Poston's account to Congress of his council with the "tribes of the Colorado," including "Hualapais," appears, R. 130-37. He was at the time Territorial Representative, and speaking on the appropriation bill which created the 1865 reservation. See also *Walapai Papers*, p. 33, for contemporary official recognition that the Walapai were of the tribes for which the reservation was created.

but in the meanwhile their old hunting grounds had been settled by white people. The President attempted to give them a reservation in 1883, because they had no place to live save the unsuitable reservation of 1865 (W. P., 134-5, 146).

A summary of the policy is given in *Lockhart* v. *Johnson*, 181 U. S. 516:

> "Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an executive withdrawal under such authority, either express or implied." (P. 520.)
>
> "* * * Whatever reservation there is must be looked for in the statutes of the United States * * *." (P. 523.)

This land policy resulted in the institutional organization of Arizona. The tax resources, as well as political power, of the Territory and State, were vitally affected by the extent of "Indian country." That Arizona, outside reservations, was not "Indian country" is confirmed by the Enabling Act (June 20, 1910, 36 Stat. 557) and the State Constitution. The Enabling Act required Arizona State to disclaim all power, proprietary and political, to

> "* * * all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, * * *"

and provided that the United States retained full proprietary and political power to such lands "until the title of such Indian or Indian tribes shall have been extinguished." Accordingly, "Indian country" in Arizona is composed entirely of "reservations" created by the United States or some predecessor sovereign.

The policy to create new and preserve old taxable

wealth, to sustain Arizona institutions, was for a time obstructed by additions of lands to Indian reservations by Executive order. This practice was forbidden by the Act of May 25, 1918 (40 Stat. 561, at 570, Title 25, Sec. 211, U. S. C. A.; Legislative history, R. 120-25), providing "That hereafter no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress." Thus did Congress announce again that Indian rights shall be confined to reservations, and prohibit what is sought to be accomplished in this action, namely, the extension of an existing one. This act alone is a complete answer to the Petitioner.

We omit all further details of legislation and administration. They are voluminous, not intricate, and lucidly expressive of the policy of the Congress, summarized by Mr. Kappler:

> "In regard to land acquired by the United States from Spain and Mexico, the Indian right of occupancy is not recognized, except where recognized by Spanish and Mexican Governments prior to cession to the United States, or where the United States gave rights to the Indians within the ceded territories by treaty, act of Congress, or executive order, after cession, or by treaty or act of Congress recognized that Indians within these ceded territories possessed such rights of occupancy or possession." (IV Kappler, *Indian Affairs, Laws and Treaties*, Senate Document 53, 70th Congress (1929), pp. 1170-71.)

Conclusion.

Petitioner's theory, which it seeks to have adjudicated, is important only in the sense that any effort would be important which sought to reverse the plain meaning of laws, ignore over ninety years of harmonious administration thereof, and overturn judicial decisions, pursuant to all of which private titles in the Mexican Cession if not the

entire west are vested, and political and social institutions are builded. Every acre of Arizona and New Mexico was once occupied by wild Indians just as much as the lands here in dispute (R. 93); and there was Indian "cession" of none of it. *Hayt* v. *United States*, 38 Ct. Cls. 455.

We respectfully submit that there is nothing in the case which warrants granting of a writ.

Respectfully submitted,

CHARLES H. WOODS,
Chicago, Illinois.

RICHARD FENNEMORE,
Phoenix, Arizona.

JOYCE COX,
Chicago, Illinois.

1211 Railway Exchange,
Chicago, Illinois.
February 15, 1941.

APPENDIX.

(Public—No. 785—76th Congress)

(Chapter 722—3d Session)

(S. 2009)

AN ACT

To amend the Act to regulate commerce, approved February 4, 1887, as amended, so as to provide for unified regulation of carriers by railroad, motor vehicle, and water, and for other purposes.

TITLE III—MISCELLANEOUS

Part II—Rates on Government Traffic

SEC. 321. (a) * * *

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the rai[illegible] operated by it, the provisions of law with respect to [illegible]ensation for such transportation shall continue to ap[illegible]o such transportation as though subsection (a) of [illegible]is section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully

and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

Approved, September 18, 1940.

RELEASE

Santa Fe Pacific Railroad Company, a corporation organized and existing by virtue of an Act of Congress approved March 3, 1897 (29 Stat. 622), with office and principal place of business at New York, in the State of New York, hereby, in accordance with section 321 of Part II of Title III of the Transportation Act of 1940, and the rules and regulations issued thereunder by the Secretary of the Interior, relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

This release does not embrace the rights of way or station grounds of this company, lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

IN WITNESS WHEREOF, Santa Fe Pacific Railroad Company has caused this Release to be signed in its corporate name and acknowledged or proved by its President and its corporate seal to be hereunto affixed and the same to be attested by the signature of its Secretary, this 17th day of December, 1940.

SANTA FE PACIFIC RAILROAD COMPANY,
By (Sgd) E. J. ENGEL,
Its President.

(SEAL)

Attest:
(Sgd) R. M. HOGIN,
Its Secretary.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.

On this 17th day of December, 1940, before me, the undersigned _____, a notary public within and for the county aforesaid, appeared E. J. Engel and R. M. Hogin, to me personally known, who, being by me severally and duly sworn, did say that he, the said E. J. Engel, is the President, and he, the said R. M. Hogin, is the Secretary, of Santa Fe Pacific Railroad Company, the corporation which executed the foregoing instrument, and that the seal affixed thereto is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and the said E. J. Engel, as President as aforesaid, and the said R. M. Hogin, as Secretary as aforesaid, acknowledged before me the said instrument to be the free act and deed of said corporation, and acknowledged that they, as President and Secretary respectively, executed the said instrument on behalf of said corporation for the purpose and consideration therein expressed.

WITNESS my hand and notarial seal this _____ day of December, 1940.

_____
Notary Public.

My commission expires _____

(NOTE:—Details of execution of the foregoing acknowledgment were not available at time of printing, but will appear on certified copy which will be furnished as soon as received.)

LAND DIVISION.

Jan. 4, 1941

Hon. Fred A. Johnson,
Commissioner of the General Land Office.

MY DEAR MR. JOHNSON:

This will refer to the releases of land grant claims filed by the Atchison, Topeka and Santa Fe Railway Company and the Santa Fe Pacific Railroad Company, pursuant to the Act of September 18, 1940 (Public No. 785—76th Congress), and the regulations prescribed thereunder.

The statute provides that if a land grant railroad desires to receive the benefit of the Act, it is required to file with the Secretary of the Interior in the form and manner prescribed by him, a release of any claim it may have to lands, interests in lands, compensation or reimbursement on account of lands or interests in lands so granted, claimed to have been granted or claimed should have been granted. The Act does not require the reconveyance of land already patented or certified or prevent the issuance of patents for land listed or selected where the listing or selection was fully and finally approved by the Secretary of the Interior prior to September 18, 1940, to the extent that the issuance of such patents may be authorized by law.

The odd numbered sections of land within the Walapai Indian Reservation, Arizona, are unpatented and are not within the exceptions to the aforesaid Act, but said sections are claimed by the Santa Fe Pacific Railroad Company, which claim is now being contested by the United States in the Courts. The Act does require the Railroad to release its claim to such sections if it intends to receive the benefits of said Act.

It is assumed by this Office that the releases submitted do cover the odd numbered sections of land within the Walapai Indian Reservation. Otherwise there would appear to be an evasion of compliance with the specific language contained in the Act. Therefore, to avoid any controversy in the future as to whether the releases cover the odd numbered sections of land in the Walapai Indian Reservation, it is requested that any official action by your office, relative to accepting the releases, be held in abeyance and that the Companies be required to indicate formally, in writing, that the odd numbered sections of land within the

Walapai Indian Reservation are covered by the releases tendered.

Sincerely yours,
(Signed) JOHN COLLIER,
Commissioner.

JMS:ds
1-3-41

cc: Mr. Lawrence Cake,
Local Representative Santa Fe
Pacific Railroad Company,
Woodward Building.
Washington, D. C.

LAWRENCE CAKE

WASHINGTON, D. C.
January 6, 1941.

The Commissioner of the General Land Office,
Washington, D. C.

SIR:

Referring to informal conference with Mr. Havell regarding the release of land-grant claims filed by the Santa Fe Pacific Railroad Company in accordance with Section 321, Part II, Title III of the Transportation Act of 1940 and the regulations thereunder promulgated in Circular No. 1480, and to letter dated January 4, 1941 from the Commissioner of Indian Affairs regarding the attitude of the company toward the unpatented odd-numbered sections within the Walapai Indian Reservation, I have to advise that I have communicated with the company and have been informed that the lands in question within the Walapai Reservation are intended to be and are included in the release which has been filed. I was given this assurance by telephone on Saturday and later I received the enclosed telegram from Charles H. Woods, General Solicitor, Santa Fe Pacific Railroad Company.

Respectfully,
(Signed) LAWRENCE CAKE.

Enc:

UNITED STATES DEPARTMENT OF THE INTERIOR.

Office of the Secretary,
Washington.

Jan. 15, 1941.

Charles H. Woods, Esquire,
General Solicitor,
The Atchison, Topeka and Santa Fe Railway System,
1211 Railway Exchange,
Chicago, Illinois.

MY DEAR MR. WOODS:

On December 18, you, together with Lawrence Cake, Esquire, filed releases of land grant claims executed on December 17 by the Atchison, Topeka and Santa Fe Railway Company and the Santa Fe Pacific Railroad Company under Section 321(b), Part II, Title III, Transportation Act of 1940, and Circular No. 1480, the regulations governing such releases. The Santa Fe Pacific Railroad Company owns the land grant involved, and the Railway Company *supra* operates the line of railroad and owns the Railroad Company. The land grant has not been adjusted and closed.

The Railroad Company has filed a list containing the names of all innocent purchasers of unpatented lands prior to September 18 together with a description of such lands. Section 273.65(c). The Land Commissioner of the company made affidavit on December 12 that other than the lands in the above list no unpatented grant lands have been sold or are otherwise encumbered.

Where a grant has not been finally adjusted and closed, the release must be recorded in each county where the released lands or interests are situated. Section 273.65 (d), Circular No. 1480. Also, the release should be supported by certificates from the county officers to the effect that there are no tax or mortgage liens or other encumbrances of record affecting any of the lands reconveyed to the United States. Section 273.65(e), Circular No. 1480.

The release of the Santa Fe Pacific Railroad Company is enclosed herewith in order that it may be recorded in conformity with Section 273.65(d), Circular No. 1480.

For the purpose of the record it is requested that the companies file in this Department a document executed and acknowledged by an authorized officer or officers of

the companies, acknowledging and certifying that the releases heretofore submitted are intended by the companies to, and do, relinquish and quit claim to the United States of America, among other lands, all unpatented lands of the companies, or claimed by the companies under the act of July 27, 1866 (14 Stat. 292), within the Walpai Indian Reservation in Arizona, and which are included in the case of *United States* v. *Santa Fe Pacific Railroad Company*, pending in the Federal Courts.

Upon the return hereof, with evidence of recordation and the evidence required by Section 273.65(e), and the preceding paragraph hereof, the matter of the approval of the release will be given prompt consideration.

Sincerely yours,

(Sgd) OSCAR L. CHAPMAN,
Assistant Secretary.

Enclosure 59772.

INDENTURE OF FURTHER ASSURANCE.

INDENTURE of further assurance made this 23d day of January, 1941, by SANTA FE PACIFIC RAILROAD COMPANY, a corporation organized and existing under and by virtue of an act of Congress approved March 3, 1897, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation organized and existing under and by virtue of the laws of Kansas (hereinafter sometimes collectively called Companies).

WHEREAS, Companies did on the 18th day of December, 1940, file with the Secretary of the Interior of the United States of America releases of land grant claims executed by them, respectively, on the 17th day of December, 1940, under Section 321(b), Part II, Title III, of the Transportation Act of 1940, and Circular No. 1480, the regulations governing such releases, and

WHEREAS, said Secretary of the Interior, by letter of Oscar L. Chapman, Assistant Secretary, dated January 15, 1941, has requested Companies to execute and acknowledge by an authorized officer or officers an instrument acknowledging and certifying that the releases heretofore submitted were intended by Companies to, and do, relinquish and quitclaim to the United States of America, among other lands, all unpatented lands of Companies, or claimed by Companies under the act of July 27, 1866 (14 Stat. 292), within the Walapai Indian Reservation in Arizona, and

which are included in the case of *United States* v. *Santa Fe Pacific Railroad Company* (114 Fed. (2d) 420), pending in the Federal Courts:

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That, in consideration of the premises and for the purpose of further complying with said Section 321 (b), Part II, Title III, of the Transportation Act of 1940, and Circular No. 1480, SANTA FE PACIFIC RAILROAD COMPANY and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY do each hereby acknowledge and certify that the said releases filed with the Secretary of the Interior of the United States of America on December 18, 1940, were intended to, and do relinquish and quitclaim to the United States of America, among other lands, all unpatented lands of Companies, or claimed by Companies under the act of July 27, 1866 (14 Stat. 292), within the Walapai Indian Reservation in Arizona, and which are included in the case of *United States* v. *Santa Fe Pacific Railroad Company* (114 Fed. (2d) 420), pending in the Federal Courts.

IN WITNESS WHEREOF each of the said Companies has caused these presents to be executed in quadruplicate by its officer thereunto duly authorized, its corporate seal to be hereunto affixed and attested by its Assistant Secretary this 23rd day of January, 1941.

SANTA FE PACIFIC RAILROAD COMPANY,
By (Sgd.) E. J. ENGEL,
President.

(SEAL)

Attest:
(Sgd.) G. L. GARVER,
Assistant Secretary.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.
By (Sgd.) E. J. ENGEL,
President.

(SEAL)

Attest:
(Sgd.) G. L. GARVER,
Assistant Secretary.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

On this 23rd day of January, 1941, before me, the undersigned Oscar M. Carlson, a notary public within and for the county aforesaid, appeared E. J. Engel and G. L. Garver, to me personally known, who, being by me severally and duly sworn, did say that he, the said E. J. Engel, is the President, and he, the said G. L. Garver, is the Assistant Secretary, of Santa Fe Pacific Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, the corporations which executed the foregoing instrument, and that the seals affixed thereto are the corporate seals of said corporations, and that the said instrument was signed and sealed in behalf of said corporations by authority of their Boards of Directors; and the said E. J. Engel, as President as aforesaid, and the said G. L. Garver, as Assistant Secretary as aforesaid, acknowledged before me the said instrument to be the free act and deed of said corporations, and acknowledged that they, as President and Secretary respectively, executed the said instrument on behalf of said corporations for the purposes and consideration therein expressed.

Witness my hand and notarial seal this 23rd day of January, 1941.

(Sgd.) OSCAR M. CARLSON,
Notary Public.

My commission expires October 28, 1942.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 13 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 23

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA,

Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY,
A CORPORATION,

Respondent.

RESPONDENT'S BRIEF.

CHARLES H. WOODS,
Chicago, Illinois,
LAWRENCE CAKE,
Washington, D. C.,
RICHARD M. FENNEMORE,
Phoenix, Arizona,
JOYCE COX,
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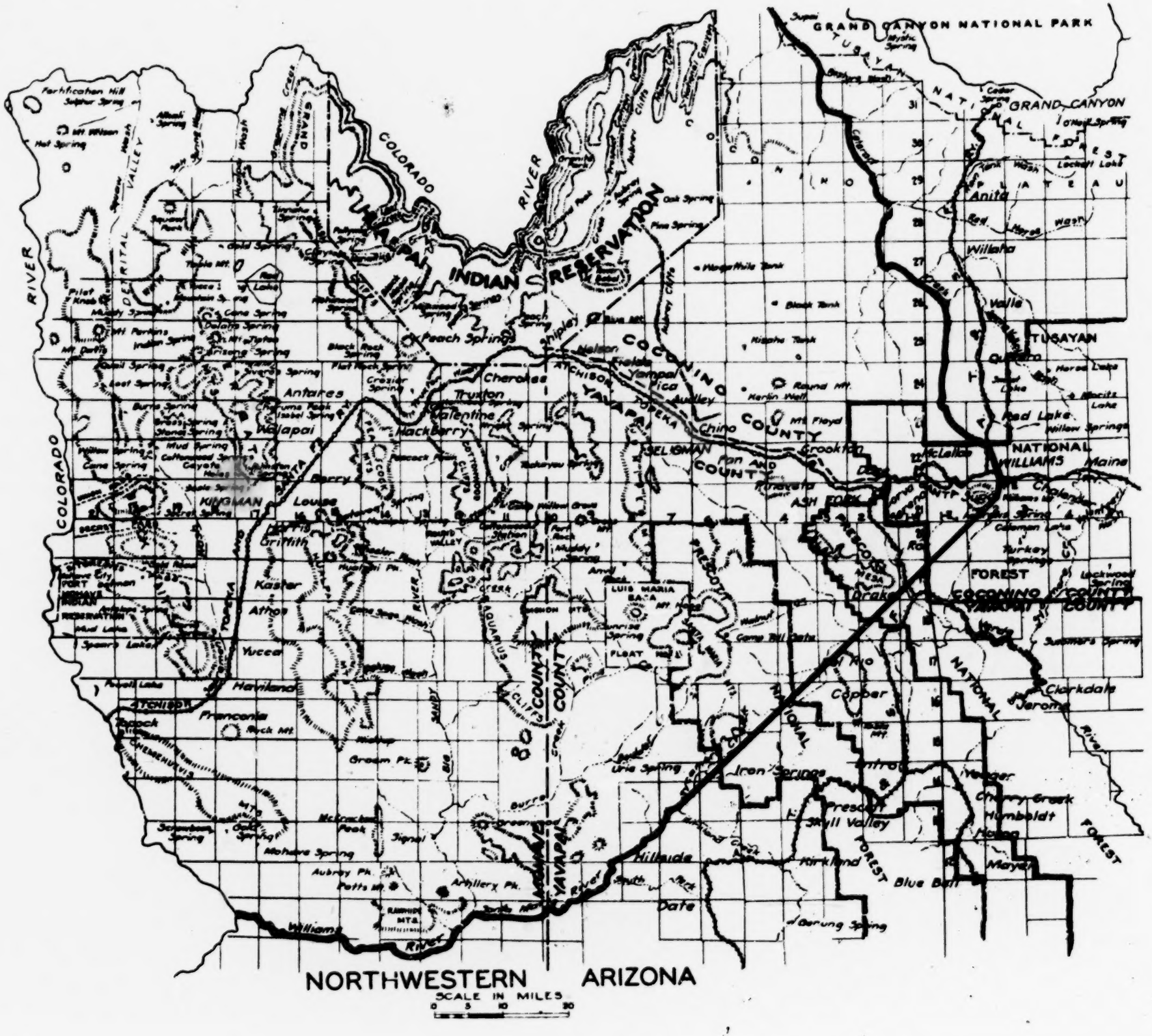
GRAND CANYON NATIONAL PARK
GRAND CANYON
COLORADO RIVER
HAVASUPAI INDIAN RESERVATION
COCONINO COUNTY
YAVAPAI COUNTY
MOHAVE COUNTY
NATIONAL FOREST
Peach Springs
Seligman
Kingman
Williams
Prescott
Jerome
Clarkdale
Cottonwood
Flagstaff
Williams River
NORTHWESTERN ARIZONA
SCALE IN MILES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 23

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA,

Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF.

I.

INTRODUCTORY STATEMENT.

A. *Proceedings Below:*

Respondent is the purchaser of lands granted to the Atlantic and Pacific Railroad Company by the Act of July 27, 1866, 14 Stat. 292 (See Appendix to this brief,[1] 27). In controversy in the *first cause* of action are all lands within

1. Hereinafter cited as "Appendix".

the "Walapai Indian Reservation," and in the *second cause* all lands outside of said "Reservation," excluding the Mojave Reservation, bounded on the North and West by the Colorado River, and on the East and South by the heavy line on the map attached as a frontispiece hereto. (R. 3, 5-7, 11-14.)

Possession in fact of a vast area, comprising about one-eighth of Arizona, and including such towns as Williams, Ash Fork, Seligman, and Kingman, and exclusive possessory rights to all of it, are alleged on behalf of Indians numbering about 450.[2]

In the trial court, Respondent moved to dismiss (R. 24-6), and supported the motion by memorandum of points and authorities (R. 26-190), under the following headings:

I. The Walapai Have Never Been Accorded Any Possessory Right in the Lands Involved Under the Policy and Laws of the United States. (R. 29-67.)

II. Any Walapai Right or Title Has Been Extinguished. (R. 67-73.)

III. Respondent's Title Has Been Vested and Confirmed by the Political Authorities in Such Manner That It Is Beyond Challenge. (R. 73-84.)

IV. The Court Should Take Judicial Knowledge of All the Matters Referred to in the Points and Authorities, and Dismiss the Cause. (R. 84.)

These "points and authorities" contained many references to statutes of the United States (for their textual reproduction, see appendix hereto, separately filed), to the Congressional Globe and Record, to decisions of the Supreme Court construing the grant to the Respondent and

2. Lieutenant Colonel Brayton's census of 1888, the first authentic census, as distinguished from prior estimates, showed 646, living at various places, working for white people, a few cultivating gardens. (Walapai Papers, 187-8). In 1924 the Board of Indian Commissioners reported that the "population of 440 Walapai Indians, with the exception of a few families, live in towns scattered along the Santa Fe Railroad for a distance of 100 miles. * * *" (*Ibid*, 204.) The same Board reported in 1928: "Principally because of the demand for unskilled labor, the Indians are allowed to remain in their nondescript camps on the edges of town." (*Ibid*, 208.)

other statutes, to opinions of the Attorney General, to constructions of the laws of Spain and Mexico, to executive documents and other authentic references which show the history of the area in question and of the Indians and the railroad, and to other matters which are known to the Courts without proof. The method employed was that described by this Court as appropriate in *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292. The theory of judicial knowledge employed was the theory of such cases as *Arizona* v. *California*, 283 U. S. 423; *Nev-Cal Electric Securities Co.* v. *Imperial Irrigation District*, 85 F. (2d) 886, 904-6, certiorari denied, 300 U. S. 662; *Hoyt* v. *Russell*, 117 U. S. 401, 404-5; *Jones* v. *United States*, 137 U. S. 202, 214-16. Its substance is that a false pleading of matters of public history will be judicially determined to be untrue. Compare *United States* v. *Sandoval*, 231 U. S. 28 (an Indian case), reversing because of facts judicially known.

The trial court, upon extensive arguments and voluminous briefs, dismissed the petition (R. 190-196); and this action was affirmed by unanimous opinion of the Ninth Circuit Court of Appeals. (R. 204-213; 114 F. (2d) 420.)

There was no "confusion" in the Courts below, no "essential ambiguities" in what either did. Both held that the laws of the United States, and their interpretation and application by the Executive branch of the government, had confirmed in Respondent full beneficial ownership of the lands in litigation, and denied to the Indians the rights asserted for them. Both considered immaterial any proof which could be offered as to nature and extent of occupancy by Indians, and as to their tribal organization. Thus the trial court referred to certain references as proving, not the point on possession and tribal organization on which they had in part been cited (see footnote 3, page 8, Petitioner's brief [3]), but as proving that the Walapai were of

3. Hereinafter referred to as "Brief".

the savage tribes referred to in the Treaty of Guadalupe Hidalgo, and had no rights from the laws of Spain and Mexico. The trial court stated—and this the Petitioner has not challenged in either Court below or here—that "plaintiff * * * does not controvert this point."[4] If the point is controverted here, Petitioner must reverse its admission in both Courts below. The trial court made no finding as to actual occupancy or tribal organization; indeed, expressly held that such questions were immaterial in view of "the controlling effect of public law and public administration, which the Court judicially knows." (R. 196.) The Circuit Court of Appeals noted the incontrovertible fact that the Walapai were forcibly removed in 1874 to the reservation provided for them in 1865 by Congress (R. 211); but with no other reference to possession in fact, held on the basis of the laws of Congress and their lawful administration, the act of 1865 among them, the effect of which "can not be affected or overcome by testimony of possession, * * * that the Walapai * * * have no recognized right of possession of public lands other than in reservations set apart by the government for the tribe." (R. 212.)

B. *Status of First Cause of Action.*

The particular background of this litigation pertains almost exclusively to the first cause of action. Since 1919 there has been some official discussion of Walapai rights; but all has related to lands in the first cause of action, and none to lands in the second. In 1919-20, the Secretary of the Interior determined that "the railroad company has full, complete and incontestable title to the odd-numbered sections in this [Walapai] Reservation," and so advised Congress in 1923. (Walapai Papers, 320-21, 206-7.)[5] He

4. R. 192. The Circuit Court said: "Since it is conceded that the title of the United States was absolute, except in the case of certain grants * * *."

5. References to Walapai Papers, Senate Executive Document 273, 74th Cong., 2nd Sess., will hereafter be abbreviated to W. P.

proposed in 1923, to avoid the inconvenience of Indian occupational rights in only alternate even-numbered sections, legislation which became the Act of February 20, 1925 (43 Stat. 954, Appendix 68), authorizing exchanges within the reservation boundaries of "*privately owned* and *State school lands*" and of "any valid filings, under the Homestead Laws or of other valid claims within the Walapai Indian Reservation * * *, so that the lands retained for Indian purposes may be *consolidated and held in a solid area* so far as may be possible." (Emphasis ours.) The Senate Committee hearings held in July, 1931, related to lands in the first cause (W. P., 239-354); and these proceedings were followed in September and November, 1931, by opinion of the Solicitor for the Interior Department and the Assistant Attorney General (W. P. 318-27), sustaining Respondent's claims to first cause lands. On June 13, 1932, the Senate tabled a resolution introduced by Senator Frazier, which would have directed delay in consummation of agreement for exchange of first cause lands negotiated under this Act of February 20, 1925.[6] This suit ensued, involving for the first time any question of Respondent's patented lands.

Respondent has, pursuant to Section 321(b) of the Transportation Act of 1940, conveyed to the United States all first cause lands. There have been filed with the Clerk of the Court certified copies of the complete evidence of the transaction which has resulted in the United States becoming possessed of all claim and title of Respondent

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6. The resolution read:
"Resolved: That the Secretary of the Interior is hereby requested to delay final consummation of the proposed exchange of lands within the Hualpai Indian Reservation with The Atchison, Topeka and Santa Fe Railway Company pursuant to the Act entitled 'An Act to Provide for Exchanges of Government and Privately Owned Lands in the Hualpai Indian Reservation, Arizona,' dated February 20, 1925, pending further investigation of the proposal by the Senate Committee of Indian Affairs and the final disposition until the 72nd Congress has such additional legislation as the committee may recommend in connection therewith." (75 Cong. Rec., Part 14, p. 15175.)

to the lands of the first cause of action. (See also Appendix, pp. 77 to 89.)

Counsel (Brief, 11) assert that the reconveyance by the Respondent to the United States of America of all lands granted, claimed to have been granted, or which should have been granted, as evidenced by the above mentioned quitclaim and instrument of further assurance, have no relevance to the merits of the pending action so far as the first cause of action is concerned. The first reason assigned is that the Indians are still entitled to an accounting under the first cause of action "for all rents, issues, and profits derived from the leasing, renting or use of lands subject to such right of occupancy by such Hualapai Tribe" (R. 20). We have no desire meticulously to narrow the cause of action or the prayer for relief by reliance upon or reference to a lack of specific clarity. However, we can be forgiven or even a mistaken conclusion that the words of the prayer "that the said defendant be required to disclose the extent of its claims, and assignments or conveyances thereof, and to account for all rents, issues and profits derived from the leasing, renting or use of the lands subject to said right of occupancy" (R. 20) related back only to that part of the petition contained in paragraph 10 of the second cause of action. There alone does Petitioner ask for an accounting. If we are mistaken in this and it was the intention of the pleader to ask for an accounting with respect to the first cause of action, it still remains true that as stated by counsel (Brief, 11) the primary relief sought now in the first cause of action is "an adjudication that the tribe has a right of occupancy and use in these lands." As to that primary issue and with respect to that primary relief Respondent is no longer interested and the issue is transferred by Respondent to the United States. The conflicting issues, to determine which Petitioner insists upon continuing the

cause, are conflicts as to which Respondent as a party to the litigation is in no wise concerned and interest in them is exclusively confined to the United States as guardian of the Indians and representing the Indians' claims on the one hand, and the United States in its sovereign capacity and as proprietor of public lands and the public domain on the other. We continue to believe and to assert that even if the execution of the quitclaim has not entirely eliminated the first cause of action, because of the broad and liberal construction of the prayer, it certainly has rendered it unimportant so far as this respondent is concerned.

Under the adjudication sought, the Department of the Interior would be able to avoid the application of the Act of May 25, 1918, 40 Stat. 561, reading:

> "That hereafter no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress. (Sec. 211, Title 25, U. S. C. A.)

When it was determined that the odd-numbered sections in the "reservation" belonged to the Respondent, and were not within a reservation, the Secretary of the Interior, in so advising Congress, reported:

> "The act of April 21, 1904 (33 Stat. L., p. 211), provides that any private land over which an Indian reservation has been extended by Executive order may be exchanged by the owners for lands outside of the reservation, but in view of the act of May 25, 1918 (40 Stat. L., p. 570), which prohibits the creation of an Indian reservation or an addition to one already created within the States of New Mexico and Arizona except by act of Congress, this Department has held that an exchange under the act of 1904 might be considered as a violation of the spirit and intent of the act mentioned." (W. P., 207.)

In result, Congress passed the Act of February 20, 1925

(Appendix, 68), authorizing, not the extension of Walapai rights to all lands in the "reservation," but the consolidation of holdings by exchanges of Indian even-numbered sections for railroad odd-numbered sections.

C. *The Issues and Some of the Interests Involved.*

Three of four bases of action asserted in the petition and argued in the District Court are abandoned. It is no longer contended that the lands in issue were not granted, or that the executive order of 1883 setting aside the "Reservation" made the grant ineffective as to first cause lands, or that as to them the doctrine of adverse possession is applicable. The sole contention now is that the grant consisted only of the naked legal title, encumbered by the actual and exclusive right to and possession by the Walapai—in effect that nothing of substance was granted. The case stands, we suggest, as an action solely by and on behalf of Indians against Respondent, but also against the interests of the sovereign and proprietary rights of the United States.

The counsel for the Walapai find themselves, with respect to the questions of Indian right, opposed, in a field indubitably one of political and not judicial cognizance, to everything that has been done by the United States in its sovereign and proprietary capacity, for more than ninety years. Thus, the Department of Justice declined to appear for the Walapai, though consenting to have the Department of the Interior "prepare the present case," because the Department of Justice "has taken the opposite position in the Court of Claims that there is no Indian right of aboriginal possession which will ground a claim against the United States" (R. 215-16). The position taken is that which was honored in a number of Court of Claims cases, for example *Duwamish, et al., Indians* v. *United States*, 79 Ct. Cls. 530. The opinion thus sets forth the position of the Department of Justice.

speaking for the United States as sovereign and proprietor:

> "'* * * the Government never having recognized that these tribes were the possessors of title in any degree to the land now claimed by them, they have no right thereto which can be litigated in this or any other court; that whether or not an Indian tribe has title to any particular section is dependent in the first instance upon sovereign recognition and that until that recognition has been accorded by the sovereign the entire matter rests in the realm of politics and is not determinable in a court of law or equity.'" (p. 597.)

This position was approved in its fullest scope by the Court of Claims. (This Court refused a writ of certiorari, 295 U. S. 755.) It is the position long maintained by the Chief Executives of the Nation, with the advice of the Attorneys General and other members of the Cabinet (R. 99-109). It is the position correctly descriptive of the Constitution and the laws. It is the position maintained by the present Solicitor of the Department of the Interior when acting as counsel for the government rather than as advocate for the Indians. Advising on Papago rights, the cases bearing on which are made much of in the present case by him as Walapai counsel (see petitioner's treatment of *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, and *Law* v. *Pueblo of Santa Rosa*, 249 U. S. 110), he concluded:

> "It follows that the question of the appropriate manner of protecting the Papagos in their possession was, and still is, a matter exclusively of political cognizance. * * * The present measure of the legal rights of the Papagos is the Executive order of February 1, 1917, as modified by the Act of February 21, 1931." 54 I. D. 359, 370.

With respect to first cause lands, the Secretary of the Interior called to the attention of Congress the fact that they were not Indian reservation lands and that there-

fore Congress had forbidden that they be devoted to Indian use. Congress enacted legislation on the strength of this report. Now that the lands are the property of the United States, counsel for the Walapai seek an adjudication in this case in which only the Indians and the Respondent are in fact represented, that first cause of action lands may be dedicated to Indian use despite the law of Congress which made them, until changed by Congress, a part of Arizona that could not be used for Indians. Further, and equally despite this law, the Indians seek a decision which will permit the dedication to Indian use of all second cause of action lands.

The Respondent is the holder of the warranty of the United States, issued by the Chief Executive of the nation pursuant to his duty and authority, conveying to Respondent the *right and title* to second cause lands, "to have and to hold the said tracts with the appurtenances thereto." (R. 21-24.) *Florida* v. *Georgia*, 17 How, 478, 481, 492. For these conveyances, a large price has been exacted, and continues to be exacted. The Indians could not have prevented these dispositions. The United States does not permit Indian action against itself because of them.

D. *Summary of Argument.*

Counsel for the Walapai assert that because of occupancy alone these Indians were entitled to a possessory right enforceable against everyone but the sovereign (Brief, 13-14, 15, 16). Admitting that such a right can flow only from law (Brief, 16), its existence is sought to be proved—

1. by the universal absolutes in the dictum of cases which decided tribal rights established by treaty, and of one case deciding an individual right to lands fenced and cultivated (Brief, 15-30),

2. by the fact that Congress extended Indian trade and intercourse laws, or such thereof as might be

locally applicable, none of which had any possible power to initiate rights to land (Brief, 36-47),

3. by cases which applied Indian laws to Indians, on lands granted by prior sovereigns and confirmed to them, or on reservations otherwise given by the United States, and by two decisions in cases involving Papago claims to Pueblo status and a Spanish grant, neither of which decisions was on the merits (Brief, 15-30), and

4. by "executive interpretation of the 1886 act and executive action with respect to lands of the Mexican cession," which consists of (a) the covenant with Mexico in the treaty of cession not to remove Indians like the Walapai or settle their lands with American citizens in such way as to drive the Indians into Mexico, (b) Indian treaties with certain Indians, but not Walapai, and (c) the fact that executive regulations did not expressly deny the Walapai the rights now claimed.

From these four premises only the conclusion is drawn that the Walapai have the rights claimed, outside of one reservation made by Congress, and another made by the President, of lands for their use (Brief, 13-15). This right, so established, is said to be preserved and protected, but not created or recognized, by a covenant from the United States to the railroad to extinguish Indian title, but only by voluntary Indian cession. This covenant to the railroad seems to be considered as having efficacy to convey a new sort of title, or convert the old Indian title from a mere right of possession, at the will of the United States, to a title that cannot be interfered with by the United States except by Indian consent, or an *express repeal* of the granting act in the exercise of the power of eminent domain.

Congress intended to grant and did grant to the railroad the lands in issue, in full right and title; and many acts of Congress and attendant authorized administration have concretely vested the benefits and burdens of this right and title. The intention of Congress in disposing of the public

domain, and in dealing with the Indians is controlling; and not only the granting act, but almost a century of consistent dealing by Congress and the Executive with the lands, the settlers, the Indians, and the institution of Arizona, have manifested and realized one clear purpose, to develop all the lands of Arizona with specified exceptions known as reservations, for and by white men. To this end the Indians were forced on reservations and the railroad grant itself was made. Settlers were given lands. Lands were granted to the Territory and State. All of Arizona, outside of established reservations prominent on any map, was open to acquisition by settlers and the railroad. Against the powerful and repeated manifestations of sovereign intention, and its concrete realization in Arizona as it is, the structure of the Indians' case has no more weight than a shadow.

Though conceding that the laws of Spain and Mexico are immaterial, and resting their case entirely on the laws of the United States, counsel discuss the laws of Spain and Mexico (Brief, 59-80), apparently in an effort to deny the implication that they (and not we) are able to draw from the opinions of the courts below, to the effect that these laws had some efficacy to prevent the Walapai from acquiring rights under the laws of the United States. Congress inquired what rights such Indians had under the laws of Spain and Mexico. To its own satisfaction, it found they had none, and determined to concede to none of the inhabitants of the ceded territory greater rights than enjoyed under Spain and Mexico. This determination was conclusive; it was also correct.

The decisions below gave effect to the absolute and controlling power of the sovereign intention and its application, holding irrelevant such questions as the nature and extent of Walapai "occupancy in fact" and the nature, if any, of Walapai tribal organization. Counsel for the Walapai do not understand what the courts below held

(Brief, 59), thinking that these irrelevancies were not only entertained but were controlling. They wish a trial to establish the nature and extent of "occupancy in fact," which to them has some vital legal property, potent to create an exclusive right against everyone despite the intent of the sovereign in inviting everybody but the Walapai to occupy and use the lands they claim, and in denying the Walapai all power to interfere with the realization of the sovereign will. They wish to try as a fact the issue of whether the Walapai ever voluntarily ceded rights which they never possessed, and this in the presence of the known intent of Congress and its actual realization, sufficing to deny them the lawful right to assert any such right or claim, no matter how great their desire to retain it or obstinate in fact its continued assertion.

II.

Construction of the Act of 1866 Shows That (A) Congress Intended to Grant and Did Grant to Respondent Full Beneficial Ownership of the Lands in Question and (B) Congress Did Not Intend by the Act to Concede Walapai Title or Limit Otherwise Sovereign Power to Deny the Walapai Possessory Rights.

A. *Congress Intended to Grant and Did Grant to the Railroad Full Beneficial Ownership of the Lands in Question.*

The central feature of the Act of July 27, 1866, (14 Stat. 292, Appendix, 27) is a grant of lands to the railroad. It is a present grant, and for a purpose, namely, to aid construction. To serve this purpose, the railroad would have to have the full *right and title;* and "full right and title" was intended to be granted, evidenced as soon as possible, after the completion and acceptance of each 25-mile section and the survey of the lands, by a patent over

the signature of the President (Sec. 4). When, conformably to the provisions of Section 4, the President approved the report of the Commissioners and executed the patents, he thereby (as authorized by Congress) confirmed the *right and* title of the grantee. There is now no question about title. The United States had full title at the time of the grant and passed it to the railroad. But the title the railroad received, Petitioner contends, was only a paper title; the right remained with the Indians. But the language of Section 4 says that the President shall confirm the *right and* title. Does "right and title" mean no more than "title"? If it means more, how much more short of complete title? In so far as second cause lands are concerned, the complaint alleges that Respondent holds patents, the highest confirmation of vested right and title, executed by the President of the United States, conveying the lands "to have and to hold." (R. 24.) A substantial body of lands was contemplated as susceptible of this immediate full beneficial ownership; for the construction contemplated was substantial and the need to aid it immediate and great.

This substantial body of land granted the railroad was not susceptible of location until the road should file its map of definite location; and in the meanwhile Congress did not desire to subject settlers, whom it was encouraging to locate by all means, including the building of the railroad, to the risk of settling and finding subsequently that they were on land belonging to the railroad. Hence by Section 3, Congress encouraged settlement on the granted lands by assuring settlers that they would have prior rights to any odd-numbered sections on which they might settle prior to definite location of the railroad. *Nelson* v. *Northern Pacific R. Co.*, 188 U. S. 108. Indisputably, among the lands granted the railroad were those public lands open to entry and settlement; and we will hereafter point out that

all Arizona, outside of formally created reservations, had been open to such entry since 1854.

After the lands granted had been located, they were not to be open to entry before or after survey "except by said company" (Sec. 6); but the even-numbered sections were to be open to both homestead and preemption. Thus, the purpose to encourage settlement and white development by granting lands both to settlers and the railroad is manifest.

Where was located this large body of lands open to immediate white settlement and immediate full beneficial ownership by the railroad? An examination of the situation which Congress dealt with affords a complete answer. In 1866, no Indian title existed in Missouri (R. 38). Indian Territory was all held by Indians under treaties. There were no public lands in Texas. The only exceptions to the application of the land laws and the grant in California were rights under Spanish and Mexican law and reservations created by the United States. *Barker* v. *Harvey*, 181 U. S. 481. All lands in New Mexico (including Arizona), except lands in specified reservations, had been open to settlement since 1854 (Appendix, 19). In consequence, Congress intended an immediate beneficial grant of lands in Missouri, Arizona, New Mexico, and California, and did not contemplate any Indian possessory right, depriving the title upon which it is an encumbrance of every beneficial incident, as standing in the way of its enjoyment, except in Indian Territory and reservations elsewhere.

This construction, clear from any effort to apply the intent of the grant to the ground, is rendered even more certain by consideration of the legislative history of the covenant of the United States in Section 2, to extinguish Indian titles. (See Congressional Globe extracts, R. 109-120.) The proviso "and only by their voluntary cession," was inserted as an amendment at the behest of tribes in

Indian Territory, and is in the very words of protection contained in their treaties. In the legislative history of the Indian provision of Section 2, there is no consideration of any Indians outside Indian Territory. In the light of ground conditions, this circumstance is highly significant.

Additional force is gathered to this construction by the provisions of Section 17. In enumerating the sources from which the company was expected to need and authorized to accept grants, donations, loans, powers and other assistance, Congress, so far as Indians were concerned, authorized acceptance only from "any Indian Tribe or Nation through whose *reservation* the road herein provided for may pass." The enumeration in Section 17 is on its face obviously intended to be exhaustive of the sources from which the company was expected to need or from whom it would be advantageous for it to accept grants or other assistance. The Congress at the date of the Granting Act could not determine with precision just what lands the railroad would pass through. Yet, if Petitioner's contention is accepted, the road could not obtain rights under Section 17 from Indian tribes in possession of lands by immemorial occupancy, but could from Indian tribes having reservations. The Indians of Arizona without reservations, and the Walapai who had a reservation, could have denied their consent to the very taking of the right of way across lands not in reservations; and to the theory of the Indians' counsel, there would have been nothing that either the sovereign or the railroad could have done about the matter except possibly by way of eminent domain proceedings. Congressional omission from Section 17 of lands merely occupied is a clear negation of the existence, anywhere within the lands through which the road might be expected to pass, of the rights contended for by the Walapai. Indian tribes with reservations were, in truth, the only tribes with legal rights to the lands to

be traversed; and these tribes and their lands were the Indians and lands referred to in Section 2. The Walapai had their 1865 reservation (Appendix, 26) on lands far outside those here in issue; outside that reservation the lands were granted the Railroad in full right and title.

The dominant purpose to grant these lands, manifest from the act and all that went before it, was continued in repeated supplemental legislation, and the administration of the Granting Act and other statutes. We will review this subsequent history in detail later; here we summarize.

For ninety years according to Petitioner, the Walapai Tribe has had a right of ownership, based on immemorial possession, enforceable in the courts of law or equity against everybody (including a grantee from the Government) except the United States. This right of ownership carried with it complete use and occupancy, and the right to enjoy and obtain the full fruits of complete ownership. This right emanated not from a previous sovereign, not from any specific right or title declared or recognized by the new sovereign, but from a public policy which had already been established by "the long series of federal statutes and decisions of this Court," a policy of protecting aboriginal occupancy (Brief, 16). While these statutes and decisions had no direct or specific relation to these Indians, indeed dealt with entirely different circumstances and conditions, they were said to create a general policy, to elevate it into a rule of property and to make it applicable everywhere and to all classes of Indians within the territorial boundaries of the United States. Thus says Petitioner.

During this same period and with direct and specific relation to these Indians, the United States (acting through its legislative and executive branches) has acted in an exactly opposite manner. It has treated these lands as not affected by any possessory right, but as "public land" subject to sale or other disposition as it saw fit.

During the 75 years since the granting act of 1866 was passed, or more strictly during all of the 69 years since the Atlantic & Pacific filed its map of definite location, the contracting parties (the United States and the railroad) have repeatedly and definitely acted upon a theory wholly inconsistent with that of Petitioner—a theory that the United States had full title at the time of the grant, and granted that full title to the Atlantic & Pacific.

If there be ambiguity or uncertainty as to what is or is not a public policy relied upon; if there be uncertainty as to its applicability to the territory of Mexican cession or to these particular Indians; if there be ambiguity or doubt as to the meaning of the granting act of 1866 or to the acts of Congress *in pari materia*, then resort may be had to the prior, contemporaneous, and subsequent interpretation given to those acts, by those officers of the Government charged with their administration, and to the construction given to the contract by the contracting parties. This is a familiar doctrine, often applied by this Court.[7]

Some or many of these acts and actions will need to be referred to and treated in detail in the main body of our brief to answer Petitioner's arguments and contentions. Covering so long a period, it may be guessed that they are numerous. Despite this necessary treatment in our main brief, we hope that the Court may secure in one place and at one time a distinct view in retrospect of just what has taken place over this long period. This will serve to fix the present case in its proper perspective. To that end

7. *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827).
United States v. *State Bank of N. C.*, 6 Pet. 29, 39 (1832).
United States v. *MacDaniel*, 7 Pet. 1 (1833).
United States v. *Moore*, 95 U. S. 760, 763 (1877).
Brown v. *United States*, 113 U. S. 568 (1885).
United States v. *Alabama Railroad*, 142 U. S. 615 (1892).
McMichael v. *Murphy*, 197 U. S. 304 (1905).
United States v. *Hammers*, 221 U. S. 220, 228 (1911).
Santa Fe Pacific R. Co. v. *Lane*, 244 U. S. 492 (1917).
United States v. *Minnesota*, 270 U. S. 1 (1926).

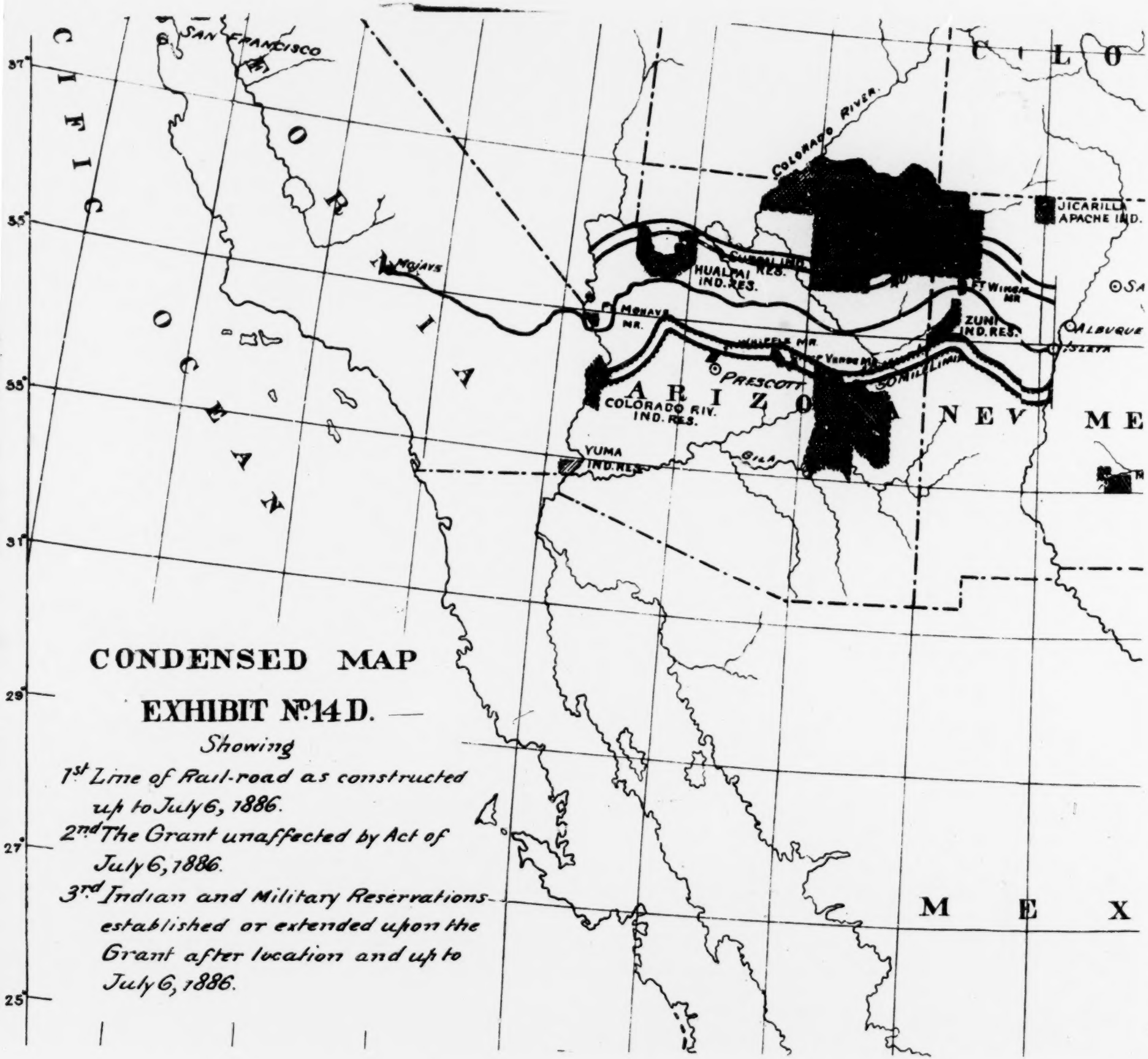
re have inserted in the Appendix, as Part V thereof, a ird's-eye view of legislative and administrative history rom the beginning to and including the latest expression f legislative will, the Transportation Act of 1940. We re confident that this broad, general survey will be con-incing as no other exposition may be of the enormity f that which is now sought to be perpetrated, of the hallenge of the good faith of the United States itself ecessarily implicit. The Court will see that the United tates has treated all of these lands, in all of this broad xpanse of territory, exactly alike, under one fundamental rinciple that the even and odd sections are equally under he public domain, parts of public land, and were to be reated and disposed of in accordance with the will of the nited States. It will see that the rule contended for by etitioner will affect not only Respondent, serious as that ay prove to be, but also all holders of title within this erritory, whether such holder be State or individual.

In 1871, Congress permitted the mortgage by the rail-oad of "its * * * lands" (Appendix, 42). "No one ould * * * loan money upon them, so long as the Indian ight of occupancy attached." *Leavenworth, L. & G. R. o.* v. *United States*, 92 U. S. 733. By the Act of 1886 Appendix, 44), Congress forfeited all lands opposite un-onstructed portions. Outside of the line in Missouri and ndian Territory, the Atlantic and Pacific's constructed ne extended from Isleta to the Colorado River. All the ountry along this route was once "occupied," in one ay or another, by savages, none of whom except the avajo had ever "voluntarily ceded" claim to any of it R. 92-4). Four days after the act of forfeiture, Congress ok steps to insure the early survey at railroad expense f lands opposite constructed sections, and their early bjection to taxation (Appendix, 44). Lands not bene-ially owned would have no value to be taxed.

Investors, quite sure in Congress's intention about title to these lands, loaned money upon them; and Cong made provision in 1897 for a foreclosure sale, the for tion of Respondent to become the purchaser of the la from Isleta to the Colorado, and a quitclaim of the la forfeited in 1886 (Appendix, 56). "No one would them * * * so long as the Indian right of occupa attached to them." *Leavenworth, L. & G. R. Co.* v. *Un States*, 92 U. S. 733. In 1902, Congress, in authori certain relations between Respondent and The Atchi Topeka and Santa Fe Railway Company, provided the grant lands (situated from Isleta to the Colorado) "to remain as now chargeable with taxes assessed and lected under and by virtue of the laws of said Territo of New Mexico and Arizona" (Appendix, 60).

Second cause lands are patented; first cause lands determined by the Secrtary of the Interior to belon Respondent, and he so reported to Congress in 1923. gress acted on this report, and in 1925 passed a law permit exchanges of the Indian even-numbered sect for odd-numbered sections owned by Respondent (Ap dix, 68).

From the very first, all the lands here involved, other lands in the grant from Isleta to the Colorado, involved in the process of adjudication and in the pro of exchanges where settlers had gone upon the land ignorance of the railroad's rights. Involved in this pro was litigation; and in none of the process, including litigation, was there ever suggestion that the Indian ri attached to any lands before a reservation was mad that the railroad had anything but perfect title to it claims in this litigation. In *Atlantic and Pacific R Co.* v. *Mingus*, 165 U. S. 413 (1897), one of the early c before this Court involving this grant, the validity of forfeiting act of 1886 was directly involved; but whole history of the grant and the lands passed by it,



CONDENSED MAP

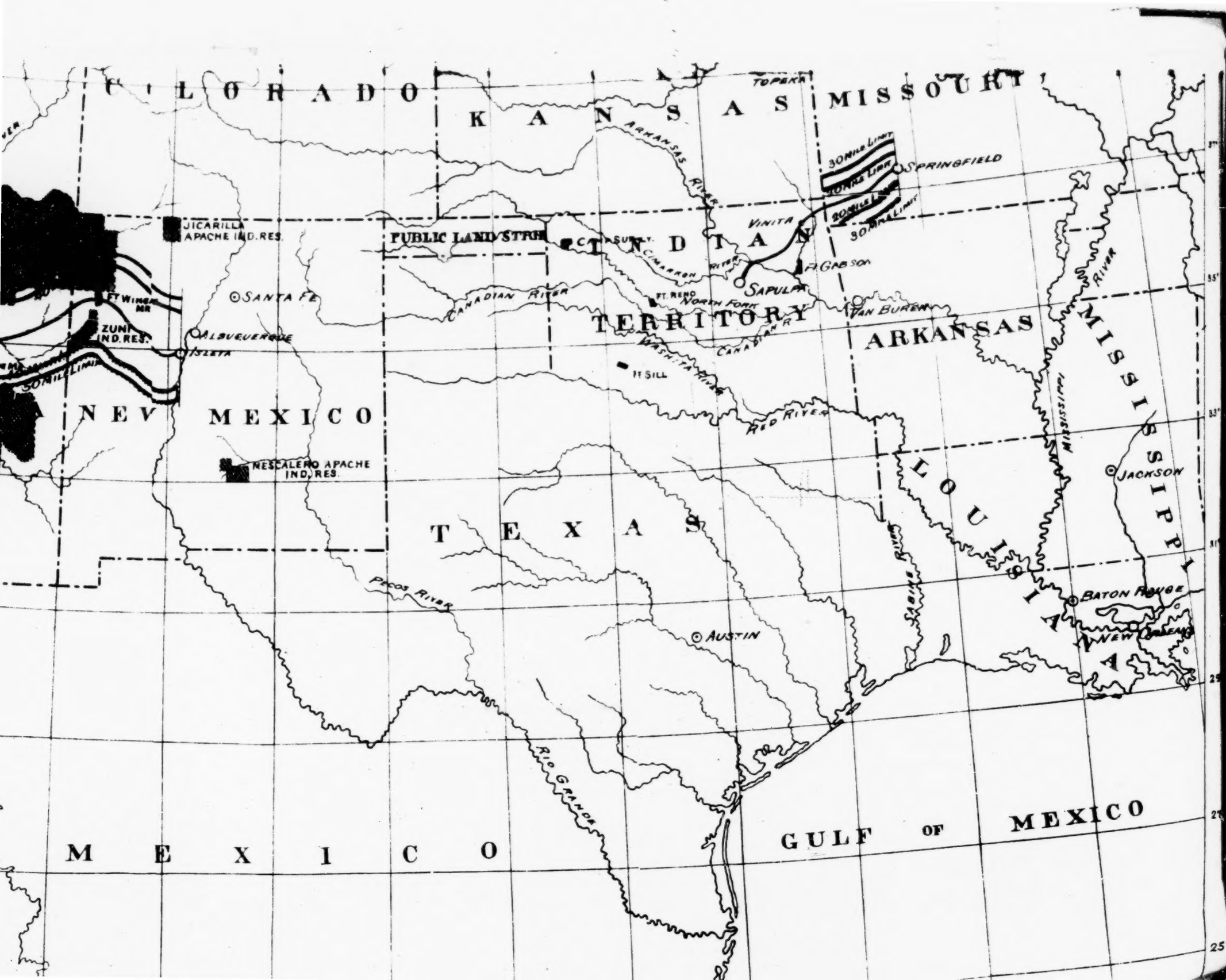
EXHIBIT No. 14 D.

Showing

1st Line of Rail-road as constructed up to July 6, 1886.

2nd The Grant unaffected by Act of July 6, 1886.

3rd Indian and Military Reserrations established or extended upon the Grant after location and up to July 6, 1886.


COLORADO
KANSAS
MISSOURI
TOPEKA
SPRINGFIELD
30 Mile Limit
JICARILLA APACHE IND. RES.
PUBLIC LAND STRIP
INDIAN TERRITORY
VINITA
FT GIBSON
SAPULPA
FT RENO
NORTH FORK
VAN BUREN
ARKANSAS
SANTA FE
FT WINGATE
ZUNI IND. RES.
ALBUQUERQUE
ISLETA
CANADIAN RIVER
WASHITA RIVER
FT SILL
RED RIVER
NEW MEXICO
MISSISSIPPI
MISSISSIPPI RIVER
JACKSON
NESCALERO APACHE IND. RES.
LOUISIANA
BATON ROUGE
NEW ORLEANS
TEXAS
PECOS RIVER
AUSTIN
SABINE RIVER
RIO GRANDE
MEXICO
GULF OF MEXICO

conditions in the territory in general, were part of the case. The United States was represented.

It is noteworthy that the grant here involved has been before this Court on five occasions.

United States v. *Southern Pacific*, 146 U. S. 570 (1892).

Atlantic & Pacific v. *Mingus*, 165 U. S. 413 (1897).

Santa Fe Pacific v. *Lane*, 244 U. S. 492 (1917).

Santa Fe Pacific v. *Fall*, 259 U. S. 197 (1922).

Santa Fe Pacific v. *Work*, 267 U. S. 511 (1925).

But in none of these cases, though vigorously prosecuted and defended, was the question presented or even hinted at which now furnishes the occasion for the sixth appearance before this Court.

The *Mingus* case demonstrates that the Indians in Indian Territory refused to cede their lands and the United States took no action to enable the railroad to be built through Indian Territory or a major part thereof, with the net result that construction was stopped in the early 1870s. This circumstance and the fact that the United States had created Indian reservations in Arizona and New Mexico along the line of the projected route were relied upon by the railroad to show that Congress itself had delayed construction and, that in consequence the act of forfeiture was unlawful. There was no intimation in the case by the railroad, as counsel for the Walapai assert (Brief, 91, footnote), or by any one else "that there were outstanding Indian occupancy titles along this proposed route." The railroad complained that the Government had created Indian reservations. What those reservations were is not in doubt. We reproduce and append hereto copy of Exhibit 14B, appearing between pages 284 and 285 of the Mingus record. The railroad was complaining of Executive order reservations, and the only intimation about Indian right in the opinion of the Court was to the effect that if Congress sought to dispose of lands granted the

railroad, of reservations made after the filing of the map of definite location, "such action might be void, but that would be no answer to the obligation of the [railroad] company to complete its route within the stipulated time." (165 U. S., at 441.)

In *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492 (1917), this Court had before it action of the Secretary of the Interior in adjudicating that four sections located near the southeast corner of Baca Float in the second cause of action lands belonged to the railroad, pursuant to the discretionary duties confided to him by law. It is said by the Court (p. 496): "The plaintiff's right to the odd-numbered sections is not questioned; indeed it is the basis of the Secretary's demand" for survey moneys. In this case, the Court passed upon one phase of the process by which the Secretary of the Interior, acting under lawful authority, has confirmed in Respondent the tax burdens of complete beneficial ownership, requiring it to pay costs of surveying its lands and, as pleaded, issuing patents over the signature of the President to all the lands in issue except the first cause of action lands, concerning which there is lacking only the evidence of adjudication that would be added by patent.

The processes of exchange, which had gone on continuously all over the territory, are exemplified in *Santa Fe Pacific R. R. Co.* v. *Work*, 267 U. S. 511 (1925), and *Santa Fe Pacific R. R. Co.* v. *Fall*, 259 U. S. 197 (1922). The binding nature of the determinations by the Secretary of the Interior, and the nature of Respondent's rights as property protected by the Constitution, are apparent from Mr. Justice Holmes' opinion in the case against Secretary Fall. The railroad lost its case against Secretary Work, just as it must win this one against the Indians, because the conclusion of the Secretary in both cases can not be said to be "capricious or arbitrary or so unreasonable as not to be debatable" (267 U. S., at 517). In all these cases

there was no question of Indian title, no question but that all the lands of Arizona and New Mexico outside of lawful reservations were from the beginning public lands. The view to the contrary made its first public appearance in the complaint that initiated this proceeding.

By all legislation relating to the grant, and all its attendant administration, the correctness of Respondent's construction of the Granting Act is proved. If counsel for the Walapai are right, then Congress and the Chief Executive and all departments under them have been wrong for almost a century, wrong in confirming Respondent's title, wrong in building an Arizona, wrong in not protecting all of Arizona from the white development to which it has been dedicated, and in not preserving it as hunting grounds for aborigines. Fortunately, in this essentially political field, in the respects in which error is alleged, what was done by Congress and by its authority is right.

B. *Congress Did Not Intend by the Act to Concede Walapai Title or Limit Its Otherwise Sovereign Power to Deny the Walapai Possessory Rights.*

We next turn to an analysis of Petitioner's construction of Section 2 of the Granting Act. It is conceded that the Act of 1866 did not *create* a right of occupancy in the Walapai, and did not *recognize* such a right as pre-existing (Brief, 14). It should follow that in determining whether the Walapai ever had such a right, or ever having had it have lost it, the Act of 1866 has no relevance; and yet it is made one of the keystones of the Walapai case.

The Act, counsel say, had the effect of *preserving* and *safeguarding* such rights as the Walapai otherwise had (Brief, 14). In consequence, it is argued, the Act gave the Indians a new sort of right both as against the United States and Respondent. Though generally "It is acknowledged by all that Congress has and always had the consti-

tutional power to extinguish Indian title with or without Indian consent," (Brief, 41) because of the Act granting lands to the Railroad, Congress could not extinguish the assumed Walapai title without (1) expressly modifying or repealing the Act of 1866 or (2) obtaining their voluntary cession (Brief, 81). This theory, based only on the railroad granting act, is given retroactive force; for it is argued that Congress did not, and we assume could not, prior to 1866, extinguish the assumed Walapai rights by offering all lands here in issue for disposal to others, and reserving from such offer, and for Walapai use, the lower Colorado River reservation (Brief, 42-44). Voluntary cession or eminent domain proceedings were apparently necessary, to this theory, even before the Act of 1866. After its passage, nothing short of voluntary cession or express modification or repeal of this Act is deemed to have any effect. Of the whole list of Acts, and the course of administration, which would suffice to negate the existence of any ordinary Indian right to possess, Petitioner considers specifically on the issue here presented only the Act of 1870 (Brief, 84), the forcible removal of the Walapai to their lawful reservation in 1874 (Brief, 87), the establishment of the 1883 "reservation" (Brief, 88), and the 1925 Exchange Act (Brief, 89), and, with respect to each, claims there was no effect on assumed Walapai rights allegedly *based on* or *created by* aboriginal possession, because there was no voluntary cession by the Walapai and no repeal of the Act of 1866.

There is also suggestion that the 1866 Act had the effect of changing the ordinary laws of taking Indian property. Ordinarily, a recognized right of possession at the will of Congress, as distinguished from a legal title vested by Congress, is a right only against third parties, but a mere political claim against the United States that may be disregarded by Congress without liability to the Indians for damages. A vested Indian title, while it may be destroyed

by Congress and the land disposed of to others, is a title the taking of which gives rise to a liability for damages, provided of course Congress sees fit to pass a jurisdictional act. Petitioner, though at times seeming to claim that the Walapai were mere tenants at will of the sovereign (Brief, 40, 41), inconsistently asserts that the Walapai title is of the vested type (Brief, 82), notwithstanding there is nothing to vest a constitutionally protected or other type of title, except the above described construction of the 1866 Act, which admittedly created no right at all. Further, it is of such a vested type that the ordinary process of taking even vested Indian titles can not apply. That ordinary process is for the United States to dispose of the land. Neither it nor the Indians can ever thereafter challenge the title of the United States' grantee. The Indians have a claim, a claim for damages, which may be asserted against the United States, but no claim against the new owner of the land. Cases asserting this type of claim against the United States are cited by Petitioner as proving the Walapai had a right, and that it has not been taken (Brief, 57-8). Apparently it is conceived that the Act of 1866 has both converted the Walapai claim into a vested right for the taking of which compensation must be paid, and limited the power of the United States to take this "vested" Indian right except by voluntary cession, or some other process than the ordinary process employed in taking Indian land.

This structure of argument is too large to be fitted upon its necessary base. That base is the provision of Section 2 of the Act reading:

> "* * * The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

In construing this language, it should not be forgotten that it appears in "An Act granting lands * * *" to the Atlantic and Pacific Railroad Company. It is not in an act having any primary relationship to Indian matters. Considering the well-known fact that Respondent's earned and forfeited lands extend only from Isleta, New Mexico, to the Colorado River, and the further well-known fact that none of the Indians who once "possessed" all this territory, except possibly the Navajo, have ever voluntarily ceded any of it, the net result of the Indians' construction of Section 2 is to prevent the Act from granting lands. The right-of-way, over which is daily transported Government shipments at rates drastically reduced to pay for all these aid lands which were not granted, is likewise, under this theory, exclusively still the property of the Indians.

Although the record does not contain evidence of exact sums which the Government has realized from reduced rates, the Court is justified in knowing they are substantial.[7] True, the Indians have not yet gotten around to claiming this other property; but to Petitioner's construction of the Act, the lands are all still theirs. Was such the intention of Congress? This theory finds no support in an analysis of the words upon which it is spun.

7. *Public Aids to Transportation*, Vol. 2, Government Printing Office, 1938, Table 24, Page 162. It will be noted that the total, to December 31, 1927, is not segregated. The underlying reports furnished by the railroads to the Coordinator gave the figures separately by lines of railroad, including the Atlantic & Pacific. See also Information Bulletin, 1939 Series No. 5, General Land Office, Government Printing Office, 1940. See also House Document No. 583, 75th Cong., 3rd Sess., "Immediate Relief for Railroads":

> "For many years land-grant reductions, usually 50 per cent of the revenue accruing to that portion of the line which is Government aided, have been made on Government traffic. Through an equalization arrangement competing roads make the same reduction on Government traffic in order to participate in the business. The reduction on this account for 1937 is estimated at $7,000,000. For the most part it affects roads in the western district where, as above noted, financial conditions are worst. The increase in Government shipments in recent years has made this reduction from the normal rates assume important proportions. No good reason appears why such reduction should continue. After all, the country must support whatever transportation system it uses. The Government, as a shipper, may well pay reasonable rates. We recommend appropriate amendments to existing statutes to remove the requirement for land-grant reductions."

Textually, the words "The United States shall extinguish" constitute a promise or obligation from the United States to the railroad, and have been held to be such. *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 68; *Atlantic and Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413, 437.

The words "and only by their voluntary cession" are textually a limitation upon the covenant to extinguish, and upon what the railroad could demand of the United States as a matter of right. It is not a limitation upon what the United States can do as a matter of its own volition and power; neither does it vest in Indians any right as against the exercise of sovereign power which they did not theretofore have. The phrase is merely something engrafted on the obligation to extinguish, restraining it and doing nothing else; in short a proviso. (59 C. J. 1087.) "Its grammatical and logical scope is confined to the subject-matter of the principal clause," and, although provisos are "sometimes used to introduce independent legislation, the presumption is that * * * it refers only to the provision to which it is attached. * * * This is emphasized when the proviso is examined in the light of prior legislation, the condition it was evidently intended to correct, and is legislative history." *United States* v. *Morrow*, 266 U. S. 531, 534-5. Accord, *United States* v. *Mullendore*, 35 F (2d) 78, 82 (C. C. A. 8); *Clay Center Bank* v. *McKelvie*, 19 F. (2d) 308, 309-10 (C. C. A., 8).

The proviso did not limit the power of Congress over the Indians or give them rights against the United States. *Gritts* v. *Fisher*, 224 U. S. 640, 648; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Wallace* v. *Adams*, 204 U. S. 415, 423; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Brader* v. *James*, 246 U. S. 88.

So long as Indian wardship continues Congress has full power to do as it wills with Indians and the property used

by them; and all acts of Congress in this respect are completely binding upon the Indians, because the United States acts for them and binds them in a representative capacity, than which there is none more perfect.

It follows that Congress was at perfect liberty, even assuming the Walapai had rights to the lands in issue either before or after 1866, to extinguish that title in any manner and at any time it saw fit. Neither voluntary cession, amendment of the granting act, nor eminent domain, was necessary. On the same assumption, we will demonstrate that the assumed rights have been extinguished, the result being to leave Respondent's admitted fee title unencumbered.

III.

The Intention of Congress Determines Whether Respondent Beneficially Owns the Land, Whether the Walapai Were Given Possessory Rights, and Whether, Assuming They Once Had Rights, They Still Retain Them.

Respondent has asserted that its rights are complete because Congress intended them to be so. The further position will be taken that the Indian claim is only a political or moral claim, because Congress has not intended to give the Indians the legal and justiciable rights asserted for them but has willed that they shall not exist. If Respondent's analysis of the intent of Congress is correct, Respondent prevails, for the Constitution provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Art. I, Sec. I.)

Delegated to Congress are all legislative powers relating to the public lands and the Indians (Art. IV, Sec. 3, Cl. 2; Appendix 1, and Art. XI, Sec. 3). Hence, the law

by which Indians are given or denied rights, and if given rights, to what lands such rights are given, and the law by which others acquire and hold rights, must be the law of Congress. Its intent, the fountainhead of all possible legal right, controls. *The Western Maid*, 257 U. S. 419, 432-3; *Carino* v. *Insular Government*, 212 U. S. 449, 457-8; *Barker* v. *Harvey*, 181 U. S. 481, 492; *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472.

As said by Mr. Chief Justice Marshall in *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823), the rule of decision is that which "our own government has adopted in the particular case, and given us as the rule for our decision" (p. 572).

As political recognition is necessary to the creation of legal Indian possessory right, *Barker* v. *Harvey*, *supra*, *Hayt* v. *United States*, 38 Ct. Cls. 455, *Duwamish et al. Indians* v. *United States*, 79 Ct. Cls. 530 (certiorari denied, 295 U. S. 755), *Coos Bay Indian Tribe et al.* v. *The United States*, 87 Ct. Cls. 143, 152-3 (certiorari denied, 306 U. S. 653), so withdrawal of recognition evidenced by a grant of lands, inconsistent with Indian right, *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, *Conley* v. *Ballinger*, 216 U. S. 84, *Super* v. *Work*, 3 F. (2d) 90, 271 U. S. 643, by a crowding out of Indians and granting of titles to white people, *Johnson* v. *McIntosh*, 8 Wheat. 543, or even by long acquiescence by Congress and the Executive in the possession of others, *Shoshone Tribe* v. *United States*, 299 U. S. 476, 495-6, *United States* v. *Creek Nation*, 295 U. S. 103, 110, or otherwise, destroys Indian right. "Save to the extent that Congress may authorize, the Government's dealings with Indian tribes are not subject to judicial review." *Klamath Indians* v. *United States*, 296 U. S. 244, 255. "* * * the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, * * *" *Beecher* v. *Wetherby*, 95 U. S. 517, 525. "These are political, not judicial

powers." *Sioux Indians* v. *United States*, 277 U. S. 424, 436. The titles created by political act are sacred in a court, but only because they have been so created, and only so long as they exist.

Nothing is better established than the proposition that rights to public lands can be acquired only from the action of Congress, and that what Congress has intended, with respect to both the public lands and the Indians, must be enforced.

IV.

The Walapai Have No Legal Rights to the Land in Issue Because They Have Not Been Given Such Rights by Congress or by Its Authority.

The trial court held:

> "3. For plaintiff to prevail, it must show some act of the legislative or executive departments of the government creating some right in the Walapai Indians superior to the rights of defendant under the Granting Act. Such an act would necessarily be a public one. Not only has plaintiff been unable to produce record of such, or suggest the existence of such, but the researches of the Court fail to show the existence thereof." (R. 192-3.)

The Circuit Court of Appeals said:

> "Since it is conceded that the title of the United States was absolute, except in certain cases of specific grants, and since there is no all-embracing rule governing the possessory rights of the Indians upon the public domain, their rights within the territory ceded by Mexico must be neither more nor less than what the government, whether justly or unjustly, chose to recognize. And that must be determined from the course of governmental action, as contended by appellee. That question we will now consider." (114 F. (2d) 420, 422; R. 207.)
>
> "The rights claimed by the plaintiff on behalf of

> the Indians were dependent upon a recognition thereof by the United States government. They were not recognized." (114 F. (2d) 420, 425; R. 210.)

These holdings are unassailable. The statutes, treaties, and public acts of the Executive, all publicly recorded, are the only possible sources by which the Walapai could have acquired rights to the land. The entire absence of any political act creating any such rights is a controlling defense of the decisions below.

A summary of the policy of Congress prevailing since 1848 appears in IV Kappler, *Indian Affairs, Laws and Treaties*, Senate Document 53, 70th Congress (1929), pp. 1170-71, as follows:

> "In regard to land acquired by the United States from Spain and Mexico, the Indian right of occupancy is not recognized, except where recognized by Spanish and Mexican Governments prior to cession to the United States, or where the United States gave rights to the Indians within these ceded territories by treaty, act of Congress, or executive order, after cession, or by treaty or act of Congress recognized that Indians within these ceded territories possessed such rights of occupancy or possession."

In *Barker* v. *Harvey*, 181 U. S. 481 (1901), the contention was made that some California Mission Indians had Mexican rights, and also possessory rights such as are claimed for the Walapai. Evidence of factual possession was received and stricken from the record. The claim of Mexican right was disposed of on the ground that the Indians had not presented claims before the Court of Claims (Appendix, 10). The claim of possessory right under the laws of the United States was denied because the United States had not chosen to make provision for these Indians, or to recognize in them any right:

> "Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government;

that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. *But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had.* Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the act creating the land commission the commissioners were required (Sec. 16) 'to ascertain and report to the Secretary of the Interior the tenure by which the Mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.' It is to be assumed that the commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary, and as no action has been shown in reference to these particular Indians, or their claims to these lands, it is fairly to be deduced that Congress considered that they had no claims which called for special action." (492; emphasis ours.)

The *Barker* case was followed in *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472, as respects claims urged in behalf of Indians as effective, under public policy, to upset political disposition of lands occupied by them. In both cases immemorial occupancy was a basis of claims asserted, and they were denied, in so far as the laws and policy of the United States were relied upon as creating

rights coincident with factual occupancy, because the United States had done nothing for such Indians. By the same token, factual occupancy of the Walapai, if any can be proved, never was transmuted by political action into legal right.

The experience of the Court of Claims entitles its opinion on Indian matters to great respect; and it has repeatedly announced the doctrine of the *Barker* case. In *Hayt* v. *United States*, 38 Ct. Cls. 455, the issue was whether certain country occupied by the Utes was Indian country. The Court said:

> "A country inhabited by Indians does not necessarily make such country Indian country within the meaning of the statutes. The status of such country must be determined with reference to the aboriginal claim arising from occupation and the recognition given by the government to the right accompanying possession." (p. 457.)
>
> "It became Indian country when the United States set apart a reservation, and not until then, and to the extent of reservations assigned to them only." (*Ibid.*, 464.)

In *Duwamish et al. Indians* v. *United States*, 79 Ct. Cls. 530, certiorari denied, 295 U. S. 755, determining that certain Washington tribes had never been accorded any rights to lands claimed, the Court of Claims sustained the Government in the following position:

> "'* * * the Government never having recognized that these tribes were the possessors of title in any degree to the land now claimed by them, they have no right thereto which can be litigated in this or any other court: that whether or not an Indian tribe has title to any particular section is dependent in the first instance upon sovereign recognition and that until that recognition has been accorded by the sovereign the entire matter rests in the realm of politics and is not determinable in a court of law or equity.'" (p. 597.)

The Court of Claims held that rights are politically created; they do not exist in law. Without political recognition, there can be only political claims, or political considerations, not cognizable in a court (pp. 598-9). The "issue is a political and not a judicial one." (p. 600.) "Right of occupancy" has been a "cardinal principle" of legislation; but the courts can not apply it when Congress has not (p. 608). The President's veto of the Chippewa jurisdictional bill, May 10, 1934, Executive Document 179, 73d Cong., 2d Sess., is quoted. In part it reads:

> "'* * * Recognition of Indian title is a purely political matter and can be accorded solely by the sovereign. Section 4 of this act might fasten upon the United States liability for the payment of the value of land which they had never recognized as belonging to these particular Indians solely because some official of the United States, minor or otherwise, had "recognized" title and occupancy by long possession as being in these particular Indians.'" (p. 599.)

Writ of error was denied in the *Duwamish* case by this Court, 295 U. S. 755. See also *Coos Bay Indian Tribe et al.* v. *The United States*, 87 Ct. Cls. 143, 152-3, certiorari denied, 306 U. S. 653.

A bill similar to the vetoed bill considered in the *Duwamish* case (a bill that would have recognized the theory that Indians of the Mexican cession had legal rights coextensive with possession, and because thereof) was passed by the 74th Congress, presumably upon the representation of Indian Commissioner Collier that possession gave legal right.[8] It was vetoed by the President after conferences

8. Mr. Collier testified:

"The proposed act, this bill, would definitely recognize that the loss by the Indians of those lands 'to which they had title arising from occupancy and use without just compensation therefor is sufficient ground for equitable relief'—that is not the enunciation of a wholly new principle. The Supreme Court has declared that the right of occupancy is as sacred as the fee and cannot be extinguished without compensation. In this case it was, but here we get a declaration. And the bill would direct that for all such lands lost, the Indians should be paid a minimum of $1.25 per acre or a maximum which

with the Departments of Justice, Treasury, and Interior, because Indians of the Mexican cession have no rights except those politically created for them in reservations; and in 1937 Commissioner Collier found it necessary to repudiate his previous testimony and correctly to describe the result of law and administration in the Mexican cession as according no rights to Indians outside of reservations. (R. 99-109).

In the entire course of this case, Petitioner has been unable to point to or suggest any single act of the Congress, or any single act of any executive officer acting pursuant to authority delegated by Congress, vesting in or purporting to vest in the Walapai Indians a title of any kind in and to the lands herein in issue.[9] The overwhelming mass of legislation and administrative action which negative the possibility of any such acts having been taken will be subsequently reviewed; here, the point we stress is that unless it affirmatively appears by the pleadings and by the public records of the United States that the United States has created some right such as is attempted to be maintained in the Walapai Indians, superior to the aboriginal confirmed rights of Respondent, no such right exists.

From the foregoing it appears that when this Court has been confronted, as it is confronted in this case, by a tribe which has not been granted rights by the Legislative Department of the Government this Court has refused to assert that such rights exist. There is, therefore, no uni-

would represent the actual value of the lands at the time lost, 'as classified under the public and mineral land laws of the United States.' Later on the report touches on that. Additional compensation is decreed, equalling the value of certain services and goods which were promised in the unratified treaties, but this factor is negligible in the total result." (California Indians Jurisdictional Act, Hearings before the Committee on Indian Affairs, United States Senate, Seventy-fourth Congress, First Session, on S. 1793, Government Printing Office, 1935, p. 7.)

9. The unsoundness of Petitioner's argument in this Court, entering upon the extension to Arizona of the Indian intercourse laws, "or such provisions of the same as may be applicable" by the Act of 1851 (Appendix to Petitioner's Brief, 7-8), will receive detailed attention later (*infra*, pp. 88 to 94).

form course of judicial decision establishing the contrary doctrine as claimed by the Petitioner. Examined on their facts, and analyzed for their precise holding, no cases cited by Petitioner sustain its claim.[10]

V.

Legislation and Administration Have Confirmed Respondent's Full Beneficial Ownership and Have Affirmatively Denied to the Walapai All Right to the Lands in Issue, and

VI.

Any Rights the Walapai May Ever Have Had to the Lands in Issue Have Been Extinguished.

A. *Preliminary Statement.*

After holding that no rights had been created for the Walapai, the trial court concluded his third finding as follows:

> "3. • • • Further, the sources and authorities cited by defendant in its points and authorities, Points ID, IE and IF (R. 33-66), show beyond possibility of challenge:
>
> "(1) that it was not the policy of the United States to accord these Indians any possessory or other right because of any alleged occupancy claim;
>
> "(2) that their only right was to such reservations as were lawfully established for them, viz., the lower Colorado River reservation established by statute in 1865, and the even but not the odd-numbered sections of the Walapai reservation established by executive order in 1883;
>
> "(3) that the lands of Arizona were from their acquisition public domain open to sale and grant; and
>
> "(4) that the Congress intended to grant and did grant to the Atlantic and Pacific Railroad Company,

10. For analysis of cases cited by Petitioner, see *infra*, pp. 78 to 88.

to whose rights defendant is successor, the lands here in controversy, except such as were reserved or disposed of to settlers, or subject to lawful claims or rights, prior to March 12, 1872, as a means of opening the country to white development and solving the corollary problem of subduing and controlling the Indians. Plaintiff's theory of public policy directly contradicts the public policy announced by every act of Congress relating to the problem and the actual course of administration by the executive branch pursuant to lawful authority. The Court's conclusion in this respect has been in part drawn * * *"

The next finding is that the long and emphatic political negation of Walapai right, which is the basis for the finding that the affirmative policy of the United States was not to create any such right, would be a withdrawal of any recognition of right that could have existed and consequently a destruction thereof. The finding reads:

"4. Had there been any rights in these Indians such as plaintiff asserts for them, there is no doubt that they were extinguished by acts of Congress and lawful acts of the executive pursuant to sovereign political prerogative, in such time and manner that the existence of such rights would not have interfered with the attachment of the railroad title. I have arrived at this conclusion from the sources and authorities referred to in support of its point II (R. 67-73) by defendant."

The Circuit Court of Appeals held:

"The Acts above enumerated, it will be observed, were all enacted prior to 1872 when the Railroad Company's rights in the land grant vested. These statutes recognized no rights of the Indians in Arizona other than those existing under Mexican law or created by reservations after the Mexican cession to the United States. These rights did not include possessory rights of Indians. No other Acts of Congress recognized such possessory rights. The rights claimed by the plaintiff on behalf of the Indians were dependent upon a recog-

nition thereof by the United States government. They were not recognized. Even if such rights were recognized and thus given substance they would be extinguished by later non-recognition" (114 F. (2d) 420, 425, R. 210).

"We conclude that evidence of which the courts take judicial notice which cannot be affected or overcome by testimony of possession, shows that the Walapai Tribe of Indians in Arizona have no recognized right of occupancy of public lands other than in reservations set apart by the government for the tribe; that this right in the reservation set apart by Presidential proclamation in 1883 is subject to the prior vested right of the appellee to the odd-numbered sections of the grant within the reservation; that the decree should be affirmed as to land in controversy both within and without the reservation" (114 F. (2d) 420, 426, R. 212-13).

The propositions here argued, and the findings of the courts below which they support, are justified by the same history of law and administration, and will be discussed together. In this discussion, we will take into account, as did the courts below, only publicly recorded Acts of Congress and the Executive, and such other matters of public history, as are not open to dispute. By this process we will seek to demonstrate the controlling will of Congress, determined from its acts and acts performed pursuant to its authority.

B. *The Public Land Laws and Their Administration Deny Walapai Right and Confirm Respondent's Beneficial Ownership.*

The territory ceded by Mexico in 1848 was, with the exception of the relatively few spots where Spanish-Mexican civilization had gained a foothold, entirely in the "possession" of the Indians. The maps and tables in the Eighteenth Report of the Bureau of American Ethnology

supply the details of this generally known condition. Except for the Pueblos, and a few other agricultural groups, this "possession" was simply that of savages such as the Walapai. The treaty of cession obligated the United States to avoid provoking, and if need be forcibly to restrain all incursions of such savages into Mexico (Art. XI, Appendix, 4; see also Trist's explanation, Appendix 7); for their type had been to the Spanish the scourges that they became to American civilization. This article "shows the character of the country. Most of it was in a wild state of nature." *Botiller v. Dominguez*, 130 U. S. 238, 244. Petitioner agrees that this Article was applicable to the Walapai and was an obligation to Mexico, but argues that the protection promised Mexico was a guarantee of "protection to all Indian tribes with respect to their original homes." (Brief, 48.) We invite attention to the language of the treaty itself, and particularly to the language indicating that the parties to it contemplated that the United States would "provide for the removal" of Indians from the ceded territory, and "for its being settled by Citizens of the United States." These contemplations were completely fulfilled in so far as the Walapai are concerned. Article IX and the protocol (Appendix, 3, 5) foreshadowed the laws later enacted protecting only grants in the ceded territory.

After the cession, the United States, with respect to Indians without grant, was free to create or withhold legal rights, and granting them, to define and limit them. Legal protection was never extended to Indians of the Mexican cession by statute in the manner of statutes for some other territories (Appendix, 75-76). With few exceptions, treaties were not made with such Indians in the ceded territory. None was made in California, Arizona, or western New Mexico. Possessory claims based upon "aboriginal occupancy" were not recognized; and Indians were generally

given reservations, created by statutes and executive orders, which were the measure of their legal right.

The legal status of Arizona lands was a question approached gradually, but the resulting policy is not in doubt. General Kearney realized that Pueblos held grants; and, with subsequent ratification by the Territorial Legislature, he incorporated these communities and gave them legal power to protect their lands (Appendix, 8). This law held the germ of the land policy finally adopted, namely, to respect Mexican and Spanish grants to Indians and others, to treat all remaining lands as public lands open to disposition, and to place Indians without grants upon reservations—lands reserved from sale and other disposition for their use.

This policy was not worked out for New Mexico (Arizona) by 1850; but the creation of a territorial government in that year indicated the direction the formation of policy was taking (Act of September 9, 1850, 9 Stat. 446; Appendix, 9). The Government was granted legislative power over the lands here in issue, and others like them, such power as is not had by states and territories in "Indian country," where Indians have dominion over the soil and enjoy varying degrees of autonomy, and where the intercourse laws are supreme. This act also granted two sections in each township for school purposes.

The land policy which came to be adopted in Arizona was first clearly formulated in California; it was the most developed part of the ceded country. Its gold deposits attracted many immigrants. William Carey Jones was sent to gather information upon the problem, then pressing in California, of what private rights existed which the United States was bound to respect, to the end of ascertaining the lands which were "public" and subject to disposal. He made an elaborate report on the Spanish-Mexican grant system, and stated that "In the wild or

wandering tribes the Spanish law does not recognize any title whatever to the soil." (S. Doc. No. 18, 2nd Sess., 31st Cong., Vol. 3, p. 34; R. 33.) Legislation promptly followed. For California, already, since September 9, 1850, a state upon an equality with other states (Donaldson, *The Public Domain*, 442), Congress passed an act to ascertain and settle the private land claims (March 3, 1851, 9 Stat. 931; Appendix, 12). The object was to determine the extent and boundaries of privately held lands, separating them from all other lands, which it was the purpose of Congress to offer for disposition under granting and preemption laws, with the exception of such "reservations" as might be created by it or its authority. *Newhall* v. *Sanger*, 92 U. S. 761; *Barker* v. *Harvey*, 181 U. S. 481.

> "All of the area of California became public domain, except certain grants made by sovereigns and governments, former owners of the soil, and was and is surveyed and disposed of under laws of the United States." Donaldson, *The Public Domain*, 443.

In this year 1851, mistaking as do counsel for the Walapai the policy of Congress, Indian Agents negotiated Indian treaties by which California Indians purported to cede legal possessory rights to certain lands and retain such rights to other lands not ceded. In 1852, these treaties were rejected because the Indians of the Mexican cession had no legal rights to any land which they could cede (R. 35-6, 99-109).

The land policy for California was concretely applied to Arizona by the Act of July 22, 1854 (10 Stat. 308; Appendix, 19). By this Act, eight years before the passage of the general homestead donation law (Donaldson, *The Public Domain*, 332), Congress rewarded past and encouraged future settlement in the territory by granting 160 acres to every settler who would live upon and improve the land. Every acre here involved, except specified reservations such as school lands granted, saline lands, lands

which might be covered by Mexican and Spanish claims, and lands otherwise reserved, was given or offered as a gift to settlers. Lands not "taken" under other provisions were made subject to the preemption law of 1841 (5 Stat. 453, c. 16). Extensive additional land grants were made to the State for school and other public purposes.

This same act of 1854, in dealing with Kansas and Nebraska lands, made no donations; and only lands *the Indian title to which had been or should become extinguished* were made subject to preemption. The contrast emphasizes what is otherwise not debatable, namely, that Congress did not respect any Indian claim to the lands here in dispute, none of them "reserved" in 1854 or since. The act has been authoritatively applied by both Congress and the Executive ever since its passage in accord with this policy. Thus, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, instructed the Surveyor-General of New Mexico on August 21, 1854, with reference to his duties under the Act of 1854, as follows:

> "It is obligatory on the Government of the United States to deal with the private land titles, and the 'pueblos,' precisely as Mexico would have done had the sovereignty not changed. We are bound to recognize all titles as she would have done—to go that far, and no further. This is the principle which you will bear in mind in acting upon these important concerns." Donaldson, *The Public Domain*, 398.

All subsequent legislation which we will examine confirms our construction of the Act of 1854. As stated by Donaldson, at page 456 of his work above cited, "all of the area of Arizona is public domain, except certain grants made by sovereigns or governments, former owners of the soil, and is surveyed and disposed of under the laws of the United States."

Counsel for the Indians make an argument in this con-

nection. Section 7 of the Act of 1854 is said to have *extended* Section 10 of the Preemption Act of 1841 to Arizona. Because the Preemption Act applied only to lands the Indian title to which had been extinguished, Petitioner argues that the Act of 1854 confirmed "the existence of rights of occupancy in the tribes of the Mexican cession area." (Brief, 40-41.) By saying the Act of 1854 was "extended," Petitioner is able to avoid the language of Section 7 of that Act, which is "that any of the lands not taken under the provisions of this act *shall be subject to the operation of* the preemption act * * *" (Emphasis ours.) Accordingly, to Petitioner, all lands in Arizona (because all were "occupied" in some sense by Indians from time immemorial) *were declared by Congress to be not subject to the operation of the Preemption Act of 1841;* and the inference is that this Section 7 likewise effects an emasculation of Section 2, which, in terms of present grant, provided that: "To every white male citizen of the United States" who met certain qualifications of citizenship and residence in the territory "there shall be and hereby is donated one quarter section or 160 acres of land."

The Act of 1854 was not an "offer * * * of Indian lands." (Brief, 41.) It was not "authority to the Secretary of the Interior to donate Indian lands." (Brief, 42.) It was the express enactment by Congress that all lands in Arizona were public lands subject to donation, preemption, and grant, and that the only exceptions to the operation of the public land laws were to be the reservations which had been or might be created by lawful authority. There could be no plainer Congressional declaration that Indians did not have exclusive rights of possession, outside of reservations, and should have no rights against any of Congress's grantees, present or future.

The Senate applied the theory of the 1854 Act to Utah

in 1863, by amending a treaty that had been negotiated with the Tabeguache Band of Utes to indicate the purpose of the Government not to recognize any rights in the Indians, or to create any outside reservations, but to Americanize the whole Mexican cession. *Hayt* v. *United States*, 38 Ct. Cls. 455.

In 1857, Congress sent Captain (Lieutenant) Sylvester Mowry to ascertain and report, as William Carey Jones had reported with respect to California lands, what private titles were to be respected and what lands were public and open to disposition by Congress in the Gadsden Purchase. He made a report that under Spanish and Mexican law "The country occupied by the wild tribes was expressly declared to be public domain." (H. Ex. Doc. 2, 35th Cong., 1st Sess., pp. 584-93.)

In the Report of the Secretary of the Interior for 1860 (S. Doc. 1, 36th Cong., 2nd Sess.), transmitted by the President under his lawful duty to make annual accounting of his stewardship, he interpreted the laws and described the result of their application as follows (R. 34-5):

> "In California the Indians have not been recognized as holding any specific tracts of country; but have been collected and transferred to reservations set apart for their protection * * *." (At p. 51 of the Report.)
>
> "With the wild tribes in the heart of the Continent, in Arizona, and in California * * * we have no treaties whatsoever * * *." "* * * the government is free to pursue such a policy as circumstances may render expedient." (pp. 34-6 of the Report.)

In Arizona,[11] Congress reserved to itself the denial and confirmation of all claims under Spanish or Mexican grants until 1891. Meanwhile, all lands covered by such claims, valid or invalid, were reserved from disposition as public

11. Arizona was created as a separate Territory, February 24, 1863. The laws of New Mexico were carried forward (12 Stat. 664; Appendix, 24). *Tumacacori and Calabazas Grant* 16 L. D. 408.

lands under the Act of 1854, together with saline lands and such other "reservations" as were made by authority of Congress. Land offices were established. (R. 40.) Surveys were begun. (R. 40, 42.) Activities of this sort are not engaged in in Indian country. In 1870, the Surveyor General was instructed to "ascertain and report upon the origin, nature, character and extent of the claim to lands in said territory under the laws, usages, and customs of Spain and Mexico." (July 15, 1870, 16 Stat. 291, 304; Appendix, 41.) The Act of March 3, 1891, creating a Court of Private Land Claims (26 Stat. 854; Appendix, 51), carried forward Congressional purpose to carve from lands of the Mexican cession open to disposition only lands held by titles which the United States was bound to respect. Section 6 provided:

> "That it shall and may be lawful for any person * * * claiming lands * * * by virtue of any such *Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico* to the United States which at the date of the passage of this act have not been confirmed by the act of Congress, or otherwise finally decided upon by lawful authority, *and which are not already complete and perfect*, in every such case to present a petition, in writing, * * *." (Emphasis ours.)

That Congress in this Act of 1891 provided that confirmations thereunder should not interfere with just and unextinguished Indian titles did not, as Petitioner argues (Brief, 91), demonstrate that possession in fact had by the laws of the United States ripened into title everywhere. It simply indicated that there were Indian titles in Arizona at that time, without itself creating new ones or attempting to define the old. What such titles were, in whom vested, and to what lands, had already been determined by other laws. Thus, under all previous legislation, and all that followed 1891, no Indian claim based only on

possession in fact was recognized as of legal right; because in the land policy of Congress all the land was offered for disposition except reservations; and the only reservations made in the interest of Indians were, *first*, lands granted to some by Spanish and Mexican grants, and, *second*, lands in reservations created for Indians by the United States.[12] In *Lockhart* v. *Johnson*, 181 U. S. 516 (1901), the Supreme Court said of the legislation beginning with the Act of 1854 and ending with the Act of 1891:

> "Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an Executive withdrawal under such authority, either express or implied." (p. 520.)
>
> "Whatever reservation there is must be looked for in the statutes of the United States * * *." (p. 523)

This land policy resulted in the institutional organization of Arizona. The tax resources, the proprietary interests, and the political power, of the Territory and State, were vitally affected by the extent of "Indian country." White properties could not be developed where Indians held complete beneficial ownership of the soil; white men could not acquire taxable ownership of such lands; and political government thereof was predominantly by the Indian intercourse laws. That Arizona, outside reservations, was not "Indian country" is confirmed by the Enabling Act (June 20, 1910, 36 Stat. 557; Appendix 62) and the State Constitution (Appendix, 64). How counsel for the Walapai can claim from these two laws aid to their case, as they do without explanation (Brief, 91-2), is not understandable; for they are precisely destructive of every

12. The Executive orders creating and changing Indian reservations in Arizona between 1855 and 1912 cover 34 printed pages (Executive Orders Relating to Indian Reservations from May 14, 1855, to July 1, 1912. Government Printing Office, 1912, pp. 3-37).

claim asserted for the Walapai. The Enabling Act required Arizona State to disclaim all power, proprietary and political, to

> "* * * all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, * * *"

and provided that the United States retained full proprietary and political power to such lands "until the title of such Indian or Indian tribes shall have been extinguished."

Article XX, Section Fourth, of the Constitution gave the required disclaimer. Accordingly, "Indian country" in Arizona is composed entirely of lands granted Indians by a prior sovereign or reserved to their use by the United States.

The fact that the reservations created excluded so much wealth from taxation prompted Congress to force under taxation as rapidly as possible lands outside reservations. We will later review (*infra*, 62-3) the manifestation of this policy toward the lands here in issue. The policy to create new and preserve old taxable wealth, to sustain Arizona institutions, was for a long time threatened with frustration by the habit of the Indian Department constantly to add undisposed of public lands to Indian reservations by Executive order. This issue was settled by the Act of May 25, 1918 (40 Stat. 561, at 570, Title 25, Sec. 211, U. S. C. A.; Legislative history, R. 120-125), providing:

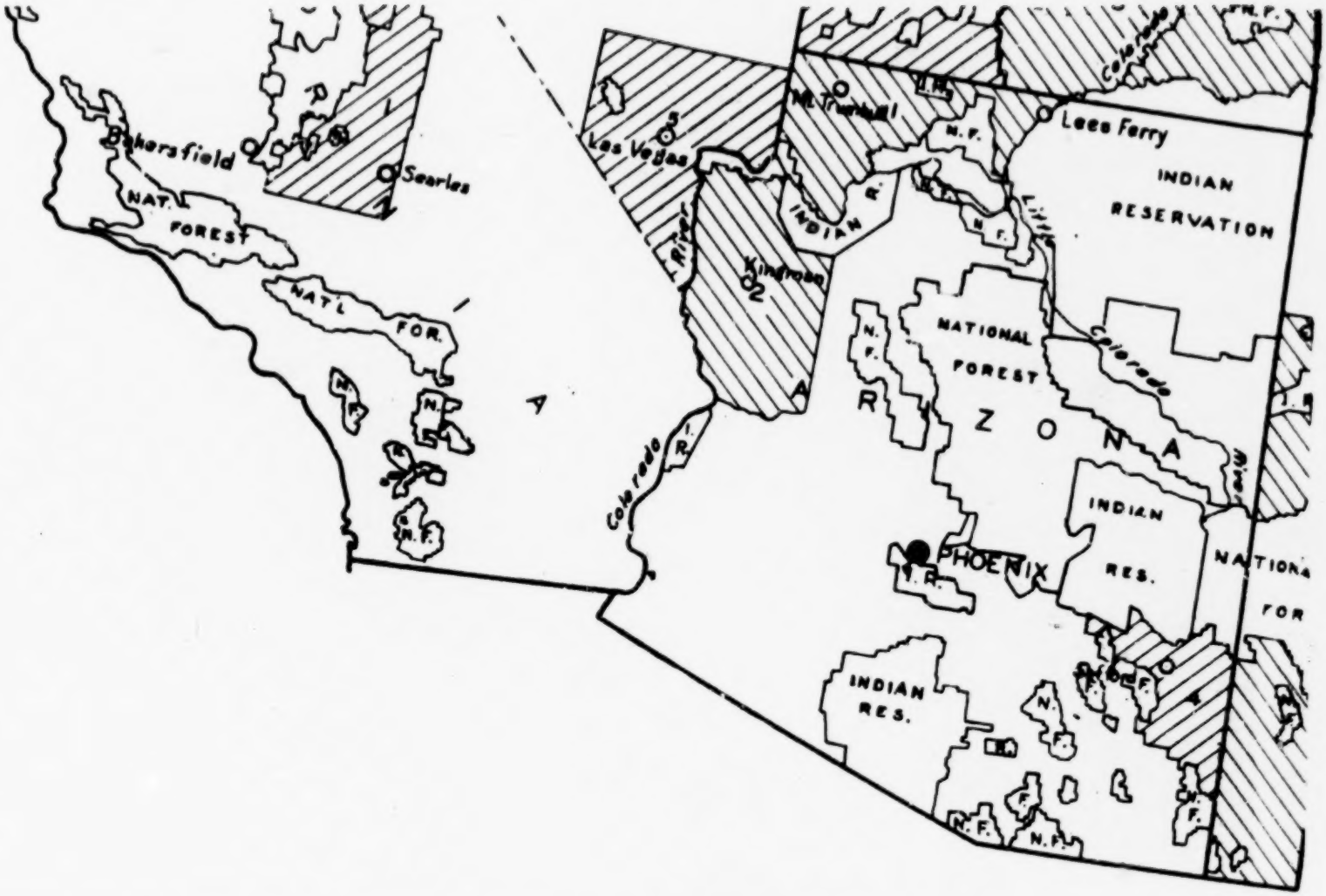
> "That hereafter no Indian reservation shall be created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."

Thus did Congress assure that Indian rights should be confined to existing reservations, and prohibit what is sought to be accomplished in this action.

Administration was from earliest times a faithful ap-

plication of Congress' land policy. In his reports to Congress of his stewardship, the President transmitted the yearly reports made to him by his Interior Department agencies. Congress was told that Indian possessory claims were being ignored (R. 34-36), and that (1) the Indians of Arizona were not treated as having soil rights, but as pensioners on the national bounty who were required to remain on the reservations assigned to them; (2) that the whole territory outside the Spanish-Mexican grants and the reservations was open to sale and grant; and (3) that the coming of the railroad was eagerly awaited as bringing deliverance from Indian hostility, and a rapid exploitation of the country by white settlers (R. 42-53). These applications of legislation, interlaced and followed as they were by legislation confirming previous legislation and administration, leave no doubt of the correctness of our interpretation of public land policy, convert it indeed into the status of a rule of property.

Administration by the present Secretary of the Interior of second cause of action lands and of such even-numbered sections as are privately owned, is administration of them as privately owned lands only; and the undisposed of even numbered sections are administered as "vacant, unappropriated, and unreserved lands" of the public domain, all under the Taylor Grazing Act (Appendix, 69). There is no challenge of the political power of Arizona. Moneys received are divided with Mohave County. The whole scheme is administration of all these lands for the benefit not of Indians but of others. Attached hereto is a reproduction of the map appearing at page 11 of the *Grazing Bulletin* for January, 1937, in so far as the same relates to Arizona. The location of the forest preserves and the Indian reservations, the location of the Taylor Act grazing district, and all other information on this map is a summation of the history of the land laws



- ● FIELD HEADQUARTERS AND REGIONAL OFFICE ALSO REGIONAL OFFICE REGION 2
- ● REGIONAL OFFICE
- ▨ ESTABLISHED GRAZING DISTRICTS
- ▭ PROPOSED GRAZING DISTRICTS
- ——— REGION BOUNDARY

N.F. NATIONAL FOREST

I. R. INDIAN RESERVATION

and their administration which have denied the Walapai all rights outside of the lawful extent of their reservation.

C. *The Concrete Application of the Will of Congress to the Walapai Has Denied Their Alleged Rights and Confirmed Respondent's Beneficial Ownership.*

Settlers responded to the invitation of Congress, and by the 1860s, particularly in mining settlements, were encroaching upon the Walapai. In 1864 Arizona's first Indian Superintendent, Poston, met with the chiefs of the Walapai and other Colorado tribes; and in recognition that they had no soil right, and needed a home upon lands reserved from the operation of the land laws, for their use, he agreed to recommend to Congress, and the Walapai and others agreed to accept, a reservation at Half-Way Bend, south of the lands here in controversy (W. P. 33, R. 130-32).

In 1865 Congress appropriated $20,000 to assist the Indians to "locate in permanent abodes," etc., and provided:

> "All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries." (13 Stat. 559.)

The use by Congress of the term "reservation" is conclusive that the Walapai had no recognized right elsewhere, and that all lands outside the reservation, both before and after 1865, were "public"; for the term *reservation* "is used in our land law to describe any body of land * * * *which Congress has reserved from sale* * * *." *United States* v. *Celestine*, 215 U. S. 278, 285 (emphasis ours). "Whatever reservation there is must be looked for in the statutes of the United States," *Lockhart* v. *John-*

son, 181 U. S. 516, 523. The laws for the disposal of all Arizona lands outside reservations had been in effect since 1854. On July 27, 1866 (14 Stat. 292; Appendix, 27), Congress sold to the Atlantic and Pacific Railroad Company, to whose rights Respondent is successor, the lands involved in this litigation.

The position of counsel for the Indians with respect to the 1865 reservation is difficult of appraisal. Three times Indian Superintendent Poston's dealings with the Indians are characterized in substance as being the promises of a politician running for Congress (Brief, 44, 99). The Walapai were not voters (Appendix 26). There is nothing in Poston's record to justify the innuendoes raised against him. In 1865, as territorial representative, speaking on the appropriation bill which created the Walapai reservation, he related his discussions with the Indians. Nothing rebuts the presumption that he was honest and conscientious. His relation is a uniquely trustworthy and significant contemporaneous account of what occurred.[13]

The 1865 reservation, counsel for the Indians assert, was not representative of an agreement on the part of the Indians (Brief 44). The point is not important, because

13. Petitioner gives a partial quotation of what Mr. Poston said as territorial representative. A more complete rendition is helpful:

"• • • I called the confederated tribes of the Colorado in council together. The council was attended by the principal chiefs and head men of the Yumas, Mohaves, Yapapias, Hualapais, and Chemihuevis. These tribes have an aggregate of ten thousand souls living near the banks of the Colorado, from Fort Yuma to Fort Mojave • • •

"But as the representative of the Government of the United States at that time, I did not undertake to make a written treaty with these Indians, because I considered that the Government was able and willing to treat them fairly and honestly without entering into the form of a written treaty, which has been heretofore so severely criticized in both Houses of Congress, and with some reason. These Indians there assembled were willing, for a small amount of beef and flour, to have signed any treaty which it had been my pleasure to write. I simply proposed to them that for all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States, they should abandon that territory and confine themselves to the elbow in the Colorado river, not more than seventy-five thousand acres. But I did not enter into any obligation on account of the United States to furnish them with seeds

the Act of 1865 did not purport to be an agreement. It was an act of Congress reserving from white occupation and disposition under the public land laws certain lands for the use of the Walapai. Walapai consent to it was not essential, although it was given; Walapai rebellion had no effect upon it as a definition of their legal rights. It is worthwhile in passing to note that this Act was passed eleven years after all of Arizona outside of reservations had been thrown open to sale and grant, and one year before the lands here in question were granted to Respondent.

Lack of funds prevented removal of the Walapai to their reservation. In September, 1865, Superintendent Leihy wrote from the reservation indicating they had not yet arrived (W. P., 37). The Commissioner of Indian Affairs was quoted to Congress in his report for 1866 as follows:

> "Plans to colonize the tribes known as the River Indians, the Yavapais, Hualapais, etc., upon a reservation on the Colorado river set apart for them by Congress two years ago, have been considered and presented to the department, but for want of necessary funds, nothing of a permanent character has been done." (W. P., 36.)

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and agricultural implements. I simply told them that if I was elected to represent that Territory in this Congress I would endeavor to lay their claims before the Government, which they understood to be magnanimous, and that I hoped that this Congress would have the generosity and the justice to provide for these Indians, who have been robbed of their lands and their means of subsistence, and that they may be allowed to live there where they have always made their homes. They desire to live as do the Pueblo Indians of New Mexico and Arizona. These Pueblo Indians live in settlements, in towns, in reservations, according to the wise policy of the Spanish Government, which colonized the Indians in reservations and made their labor valuable in building improvements for their own sustenance, for churches, and public improvements, and in that manner made them peaceable Indians, instead of having everlasting and eternal war with the people whom they had robbed of their land.

"These people having been citizens of the Mexican Government, are not, according to our theory, entitled to any right in the soil; and therefore no treaty with these Indians for the extinction of their title to the soil would be recognized by this Government. It is a fiction of law which these Indians in their ignorance, are not able to understand." (R. 130-32.)

In June, 1867, the agent at La Paz indicated that lack of funds and hostilities stood in the way of bringing the Walapai to their reservation (W. P., 41). The "Indian outbreaks" were causes "retarding the prosperity of the territory" and hampering surveys of the "public land to be disposed of"—72,906,304 acres, all of Arizona (R. 42).

In 1869, the Commissioner of Indian Affairs reported (House Exec. Doc. I, Part 3, 41st Cong., 2d Sess.):

> "*Colorado River reservation*, selected in 1864, stretching on the river from Corner Rock to Half-Way Bend, is estimated to contain seventy-five thousand acres of public domain, and upon which it was proposed to colonize about ten thousand Indians of various tribes. The Indian title to lands in the Territory ignored, and difficulties ever increasing between them and a rapidly growing population of persons from other quarters, rendered it necessary that some provisions should be made for the original inhabitants."

The Walapai presence outside their reservation continued in fact, though not as of legal right. Between 1866 and 1869, the troops of the United States waged war to subdue them and protect white settlers (W. P., 36-93). Between 1869 and 1874, they were under military surveillance. Bancroft, *History of Arizona and New Mexico*, pp. 561-3; 9 *New Mexico Historical Review*, pp. 174-5, 181. In 1871, Vincent Colyer, representing the President, ordered them fed at Beale Springs until it could be ascertained where they could be placed without interference with white exploitation of the territory (W. P., 93). He apparently did not realize Congress had given the Walapai a reservation. On November 9, 1871, General Sherman, by direction of the President, instructed General Schofield with respect to the Apaches of Arizona:

> "The Secretary of War wishes you to give all the necessary orders to carry into full effect this policy, which is the same that prevails in the Indian country

generally, viz., to fix and determine (usually with the assent expressed or implied of the Indians concerned) the reservation within which they may live and be protected by all branches of the Executive Government, but if they wander outside they at once become objects of suspicion, liable to be attacked by the troops as hostile. * * * At all events, these Indians must have a chance to escape war, and the most natural way is to assign them homes and to compel them to remain thereon * * *."

"The citizens of Arizona should be publicly informed of these events, and that the military have the command of the President to protect these Indians on their reservations, and that under no pretense must they invade them, except under the leadership of the commanding officer having charge of them." (*Executive Orders Relating to Indian Reservations, May 14, 1855, to July 1, 1912*, Government Printing Office, 1912, pp. 33, 34.)

General Howard in 1872, with power from the President, disestablished the Beale Springs feeding post and ordered all Indians to go to their reservations. See *New Mexico Historical Review* and Bancroft, *op. cit., supra.* On March 6, 1872, President Grant wrote General Schofield, under whose military jurisdiction the Walapai fell:

"Indians who will not put themselves under the restraints required will have to be forced, even to the extent of making war upon them, to submit to measures that will insure security to the white settlers of the Territories.

"It is not proposed that all the protection shall be to the Indians, but that, if they will submit to rules and limitations laid down for them, protection by military force shall be mutual." (H. Ex. Doc. No. 1, Part 5, 42nd Cong., 3d Sess., p. 545.)

The Walapai were transported to their reservation in 1874, ran away a year later (W. P., 96-114).

What was done in this interval 1865-1874 was done by authority of Congress and with its knowledge. It appro-

priated the moneys for the campaigns, and from year to year received reports as to the progress made. The purpose of the legislation and the purpose of the campaigns was to force the Indians to go to the homes provided for them by Congress and not, as counsel for the Indians maintain, to confirm them in their claims to possess all of Arizona. Counsel for the Indians even assert that the very fact that Congress appropriated moneys for the Walapai signified "a settled purpose to fix the Indians in their country, by giving them security at home." (*Worcester* v. *Georgia*, Brief, 92.) The settled purpose toward the Cherokees, to which the Court referred, was manifest in acts directly relating to them. Congress, in appropriating for the Walapai, has expressed, as it has in other legislation, quite a different purpose, leaving no ground for speculation. The 1864 and 1865 appropriations were to assist the Indians "to locate in permanent abodes, and sustain themselves by the pursuits of civilized life." (13 Stat. 180, and 13 Stat. 559.) The 1867 appropriation in the sum of $7,000 was for the same purpose, and an additional appropriation in the sum of $50,000 was made "for expense of collecting and locating the Colorado River Indians in Arizona on a reservation set apart for them." (14 Stat. 512, 514-15.) In 1868, 1869, 1870, and 1872 appropriations were made to assist the Indians to locate in permanent abodes and sustain themselves by the pursuits of civilized life.[14] In 1872 occurs the following additional appropriation: "*Collecting and locating the Colorado River Indians in Arizona.*—For completing the construction of the irrigating canal on the Colorado reservation in Arizona, $20,000." (17 Stat. 188.)

The 1876 appropriation act provided:

> "Sec. 2. That no supplies or annuity-goods for which appropriation is made in this act shall be issued to any band or tribe of Indians while the same may be

14. 15 Stat. 219 and 222; 16 Stat. 36, 357, and 556; 17 Stat. 187.

> engaged in hostilities against the United States or in depredations upon settlers: nor shall any sum of money appropriated by this act for any tribe of Indians for whom a reservation of territory shall have been made be paid to them or expended for their benefit, unless such tribe and the warriors thereof shall remain peaceably within the limits of the territory assigned to them unless absent by the consent of the agent." (19 Stat. 176, 199.)

These appropriations were only a few incidents in the numerous acts of Congress and of the Executive indicating a harmony between Congress and the officials charged with administering the laws. Petitioner has selected a statement by the Commissioner of Indian Affairs in his report of 1872 (Brief, 53) to the effect that the Government has never recognized any distinction between Indians living on territory ceded by Mexico and those upon territory ceded by Great Britain, France, and Spain. It may be true that no difference between Indians was recognized, but it is very clear that a policy was applied with respect to Indian land rights, which resulted in the Walapai never acquiring land rights in the same way that some Indians in other territories, notably east of the Mississippi River, had acquired them. The very fact that no treaty has ever been made with the Walapai, whereas treaties were the almost universal practice in early days, indicates a difference.

We accept the challenge raised by Petitioner's citation of the Report of the Commissioner of Indian Affairs for 1872. It is a part of the Report of the Secretary of the Interior, which is, in turn, a part of the President's report to Congress for that year. It is published as House Executive Document No. 1, Part 5, 42nd Congress, 3d Session. Excerpts appear in Appendix, 112.

It is not to be doubted that the Indians of the Mexican cession were no different from the Indians of other portions of the country, in the sense that all Indians are primi-

tive culturally and under guardianship politically. What had changed was the relative strength of the United States and its Indian wards. A new policy born of strength was applied to them and to other Indians to the end of promoting white settlement.

From the foregoing it is very clear that all of Arizona outside of reservations was regarded as free of Indian claim or right and open to disposition and grant by the United States. The whole of public policy was directed to the hastening of settlement, and one of the means adopted was the construction of the railroad under the act of 1866, to the end of making effectual the policy of the United States as against the very claims counsel now assert in behalf of the Indians.

After the Walapai were transported to their reservation, and after they ran away, Governor Stafford reported Chief Cherum's assurance that the Indians would not "steal from nor murder white men any more" and desired to "live in peace among the white men and make their own living by working for them, and by hunting and gathering • • •" (W. P. 104-5). After considerable discussion it was decided not to risk war by forcing them back (W. P. 106-13).

By this time "the country formerly occupied by them was settled up" (petition of ranchmen to General Kautz, W. P. 115). Surveys were made, and land offices opened for disposal of the lands. The extension of settlements under protection of troops, the disappearance of game, and the coming of the railroad which would "multiply four-fold the striking force of the army in that section," were reported to Congress as forces to accomplish the policy of further breaking the already partly broken Indian monopoly (*e. g.*, R. 45-7).

Thus recurred the old story of white penetration, crowding out Indian possession, not recognized as being a possession in legal right. The soil was parcelled out by the

sovereign "and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies." *Johnson* v. *McIntosh*, 8 Wheat. 543, 590-91 (1823). "It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it" (at 589).

After 1875, all the water and grass was taken by white stockmen (W. P. 126, 131); and very quickly the game entirely disappeared (W. P. 130-32). The Walapai worked for settlers and the railroad while not "lying around the railroad stations and small towns" (W. P. 148), and were saved from starvation during the winter months of 1879 and subsequent years by government feeding (W. P. 130-31). In 1881 they represented to Colonel Price:

> "* * * that in the country, over which they used to roam so free, the white men have appropriated all the water; that large numbers of cattle have been introduced and have rapidly increased during the past year or two; that in many places the water is fenced in and locked up; and they are driven from all waters. They say that the Railroad is now coming which will require more water, and will bring more men who will take up all the small springs remaining. They urge that the following reservation be set aside for them while there is still time; that the land can never be of any great use to the Whites; that there are no mineral deposits upon it, as it has been thoroughly prospected; that there is little or no arable land; that the water is in such small quantities, and the country is so rocky and void of grass, that it would not be available for stock raising" (W. P. 134-5).

In this there was evident a complete lack of any Walapai claim of any right to any land, a perfect recognition that they had neither possession nor right thereto, and a desire to be given rights.

A white settler even had Peach Springs, on first-cause lands (W. P. 141).

A military reservation was recommended by Genera Willcox on July 8, 1881 (W. P. 135-6); an Executive orde was issued by President Arthur, January 4, 1883, directin that a tract be reserved for occupancy of the Walapa Indians (W. P. 146; this tract includes the first cause o action lands). The tract was not suited to Walapai needs and not occupied by them. (See report of General Crook W. P. 147-8.)

In 1884, Captain F. E. Pierce was delegated to searc for land that would be appropriate as a Walapai home and recommended purchase of lands on the Sandy (W P. 160-61). Meanwhile, the Indians had become fixture around the railroad towns from Seligman to Kingman where most of them remain to this day. (Appendix, 120. In 1931, their physician recommended that they be moved "from their present unsightly and unhygienic homes t acceptable sites on the reservation" (W. P. 288).

The General Allotment Act of February 8, 1887 (2 Stat. 388; Appendix 46), provided for the allotment o lands in severalty to Indians on the various reservation and for the means by which Indians could obtain allot ments on public lands outside of reservations. Congres recognized in 1887, as the Commissioner of Indian Affair reported in 1890 (R. 37), that the "Indian title" wa found only in reservations.

The Walapai continued to live with and work for white people, keeping their promise not to interfere with thei rights. In the hearings at Valentine in 1931, the Indians did not question Respondent's complete legal rights to the grant lands both inside and outside the "reservation." As we read the record, they were concerned with lands inside the "reservation" only, and there asked, not for confiscation, but that the Government procure lawfully the rights they desired. Thus one "petition" recited in part:

"It must be apparent that the purpose of the act

of Congress of February 20, 1925, was to permit the Santa Fe Pacific Railroad Co. to consolidate its right to the ownership of lands embraced within the boundaries of the Walapai Indian Reservation into one compact area or block. As the representatives of Arizona in Congress to whom this petition is addressed know, the act under which the Santa Fe Pacific Railroad Co. now holds title to the land grants offered by Congress to the Atlantic & Pacific Railroad was passed in 1868 [1866]. It provided, in substance, for the granting to the railroad company of each alternate section of land lying along the railroad right-of-way for a distance of 40 miles on each side of the center of its track. Thus, it is that the greater portion of the Walapai Indian Reservation is embraced within the limits of the grant. • • •

"The undersigned do not regard their treatment by the United States Government in this instance as just. We believe there yet remains much open unappropriated public domain outside the limits of our reservation which could be granted to the railroad, and other claimants, in lieu of the lands they are to surrender within the reservation" (W. P., 260).

At Valentine, the Indians desired only that the Government obtain railroad lands for them, in a manner suggested by previous legislation and administration. When settlers had located on railroad lands, Congress purchased such railroad lands for them from the railroad, giving other lands in exchange therefor (Act of June 22, 1874, 18 Stat. 194; Appendix, 42). When some of Respondent's lands at Truxton were needed in 1900 for Walapai school purposes, the Interior Department found it possible to procure a conveyance (W. P., 189-91). On March 4, 1913, Congress felt it necessary to acquire from the railroad for Indian use certain railroad lands, and did so by exchanging public lands for the desired acreage (Appendix, 66). On August 24, 1922, Congress similarly acquired Respondent's rights to lands in Mohave County for white settler benefit (Appendix, 68). Similar acquisitions for Indian use of railroad

and other titles within Indian reservations were arrange by the Act of April 21, 1904 (33 Stat. 189, 211; Appendi 62), but not permitted in the Walapai reservation unde the Acts of May 25, 1918 (40 Stat. 561; Appendix, 67), an February 20, 1925 (43 Stat. 954; Appendix, 68). Thes acts are a perfect confirmation of Respondent's title a against all possible Walapai claim, and are a forcefu reminder that purchase and not confiscation is the America way of obtaining private properties for Indian use. Th Indians have not, we submit, demanded, and can not b given, privately owned land by any other method.

D. *The Granting Act and Related Statutes and Thei Administration Have Confirmed Respondent's Beneficia Title and Denied the Rights Claimed for the Walapa*

We have already advanced a construction of the Grant ing Act (*supra*, pp. 13-18) which forms the necessary back ground for this detailed study of the other laws relatin to the grant, and the details of Executive action, whic together leave no doubt of the intent of Congress to ves perfect beneficial title in Respondent and to deny al Walapai claim. On July 27, 1866, every acre of land i Arizona not reserved had been specifically made publi land, open to sale and grant. The grant was not a gratuity but a sale by contract, *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 680 (1914); *United States* v. *Northern Pacifi R. Co.*, 256 U. S. 51, 64 (1921). The Government has re ceived every benefit it contracted to receive in exchang for the lands, namely, construction of the railroad, crea tion of value for the even-numbered sections retained i the grant limits, the settlement, development, and unifica tion of the country, mobility for troops, munitions, an Government supplies, and, lastly, reduced rates for Gov ernment transportation. Items such as the last, a continu ing burden to the railroad and benefit to Petitioner

amounted to such disproportionate exaction from the railroads generally that the President recently recommended to Congress legislation to terminate it. Congress gave a measure of partial relief, but required reconveyance of part of the lands granted as a condition upon obtaining it. (Sec. 321(b), Transportation Act, 1940; Appendix, 77.) Respondent has been called upon to reconvey, and has reconveyed, all first cause lands, among others (Appendix, 78). The United States has received and will continue to receive a good price for every acre the Indians now claim.

After the Atlantic & Pacific filed its map of definite location, the Commissioner of the General Land Office, on May 17, 1872, ordered all the odd-numbered sections involved in the litigation withdrawn from settlement entry. The Commissioner of the General Land Office was making official and public record that the odd-numbered sections had passed out of the public lands, and into the railroad's private ownership, that the even-numbered sections were still public land and within his jurisdiction, but to be disposed of only as reserved even-numbered sections were ordered to be disposed of by the Act of March 3, 1853 (10 Stat. 244; Appendix, 18), and Section 6 of the Granting Act (Appendix, 34), and that until March 12, 1872, every acre involved in this litigation had been public lands, potentially subject to the grant, but open to settler entry, by virtue of Section 3 of the Granting Act and other governing laws.

As the background of administration, and of other legislation, it will be recalled that the year before the map of location was filed, Congress (Act of April 20, 1871, 17 Stat. 19; Appendix, 42) authorized the Atlantic & Pacific Railroad Company to mortgage its property. The lands were mortgaged, and the railroad from Isleta, New Mexico, to the Colorado River, was constructed, accepted, and operated (R. 57-60). In the 1890s came fiscal difficulties and default upon the mortgages; and by

Act of March 3, 1897 (29 Stat. 622; Appendix, 56), Congress provided for the purchase of the lands and other properties of the railroad at foreclosure, and their transfer to Respondent. The Act of June 27, 1902 (32 Stat. 405; Appendix, 60), provided for the sale or lease of Respondent's property to The Atchison, Topeka and Santa Fe Railway Company, also that

> "* * * said land-grant lands to *remain as now* chargeable with taxes as assessed and collected under and by virtue of the laws of the said Territories of New Mexico and Arizona. * * *" (Emphasis ours.)

There are marshalled with these last named acts, which assured mortgagees and purchasers that the railroad's title had value, acts which imposed upon the railroad the burdens of beneficial ownership. The only lands owned after 1886 and acquired by Respondent were in Arizona and western New Mexico. These acts required the railroad to pay the cost of surveying its lands and to pay taxes thereon, to the end of supporting white settler institutions and identifying for settler benefit lands which were not granted. There was no question of Indian title, only the purpose to promote white development.

The Act of July 31, 1876 (19 Stat. 102, 121; Appendix, 43), required the railroad to pay the cost of surveying its lands. The Act of July 10, 1886 (24 Stat. 143; Appendix, 44), provided that grant lands should be taxable by the territories and states after survey and before patent and that railroads would be required to pay the surveying costs after the completion of survey. It is not conceivable that Congress directed the payment of surveying costs and taxes on the naked fee, when the right to possession, indeed the entire beneficial ownership, was in the Indians.

On March 3, 1887 (24 Stat. 556; Appendix, 47), Congress implemented the Act of 1886 by requiring the Secretary of the Interior to "adjust" the land grants, *i. e.*,

determine what passed under them. Such lands would thereupon, before patent as provided in the Act of 1886, be subject to taxation; and all other lands could be disposed of to settlers.

The Act of June 25, 1910 (36 Stat. 834; Appendix, 64; legislative history, R. 126-30), was passed to expedite adjustment of land grants, and the early subjection of "the lands granted to taxation * * *." It added to the Secretary's power to adjust the grant, the power and duty to force railroads to pay, before surveying, the estimated cost. *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492. Under these laws Respondent was not merely privileged but forced to take complete evidence of title to all lands in controversy, pay for their survey, and pay taxes thereon.

Second cause of action lands are alleged to be patented as they were required to be by the laws. The history of first cause lands is, as held by the Circuit Court of Appeals, "cumulative evidence of a purpose of the government to deny a right of occupancy to Indians within the Mexican cession not recognized by Spain and Mexico," evidence applying "as well to lands outside the reservation—" (114 F. (2d) at 426, R. 426).

The legal title to the odd-numbered sections, identified March 12, 1872, had been in the Atlantic & Pacific Railroad Company since July 27, 1866, by act of Congress, *United States* v. *Southern Pacific R. R. Co.*, 146 U. S. 570. These sections were of course beyond all power of the President to reserve for the Indians. Further, even numbered sections were by Congress expressly opened to settlement (Act of March 3, 1853, 10 Stat. 244; Appendix, 18; Secs. 3 and 6 of the Granting Act, Appendix, 31, 34). Considering that the Congress had designated Lower Colorado River Reservation as the Walapai's legal home, that the odd-numbered sections belonged to the railroad, and that the even-numbered sections were dedicated to settlement by

law, President Arthur's order of January 4, 1883 (W. P., 146), was probably, at the outset, a void effort to achieve a prohibited end. His order did not, of course, affect in any way Respondent's vested title. Only the implied ratification of the reservation for Indian purposes of the even-numbered sections, afforded by the Acts of Congress which we will now discuss, appears to lend validity to the reservation for Walapai use of the even sections; and these acts and their administration have confirmed Respondent's complete title to the odd-numbered sections as against every possible Indian claim.

In 1904, Congress, because of the many instances in which the Executive had extended Indian reservations over privately owned property, provided that in such instances the owner of private lands should have the option to exchange them for lands in the public domain outside such reservation (Appendix, 62). Reservations in Arizona and New Mexico, with the exception of the Walapai, were handled under the terms of that Act (R. 64; see *Atlantic and Pacific R. R. Co.* v. *Willard*, 17 L. D. 554; Regulations under the Act of April 21, 1904, 34 L. D. 666; *Santa Fe Pacific R. R. Co.*, 35 L. D. 83 (Zuni and Navajo reserves), and 41 L. D. 96 (Moqui reserve)). It was not applied to the Walapai reserve, because the Act of May 25, 1918, above referred to (Appendix, 67), prohibited the extension of Indian reservations.

In 1919-1920, the Secretary of the Interior authoritatively determined that "The railroad company has *full, complete and incontestable title* to the odd-numbered sections in this [Walapai] reservation * * *" (W. P., 320-21, emphasis supplied). The Commissioner of Indian Affairs opposed this determination, presented every theory presented in this case, and was overruled.

In 1923, the Secretary of the Interior advised the Congress that Respondent's title had been determined to be

good, stated the Act of 1918 probably prevented exchanges under the Act of 1904, increasing the acreage reserved for Indian purposes, and suggested the enactment of a law, draft of which the Secretary attached to his letter (H. Rep. No. 1446, 68th Cong., 2d Sess. See W. P., 206-7) The Secretary's proposal became the Act of February 20, 1925 (43 Stat. 954; Appendix, 68), as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior is hereby authorized, in his discretion, under rules and regulations to be prescribed by him, to accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation in Mohave and Coconino Counties, Arizona, and to permit lieu selections within the boundaries of the said reservation by those surrendering their rights so that the lands retained for Indian purposes may be consolidated and held in a solid area so far as may be possible; *Provided*, That the title or claim of any person or company who refuses to reconvey to the Government shall not be hereby affected."

Negotiations progressed under the Act to the point of joint appraisal of the lands within the exterior bounds of the reservation, and agreement for the division of the lands between the Respondent and the Indians. In the arrangement a controversy over Peach Springs and surrounding lands on even-numbered sections was settled, and the Interior Department obtained other arrangements desired for the Indians (W. P., 225-39, 303-4, 327-46).

In the hearings before the subcommittee of the Senate Committee on Indian Affairs, held at Valentine, Arizona, on May 22, 1931 (W. P., 239-54), the Indians made it clear they wanted all the lands within the exterior bounds of the reservation (W. P., 247-83, 395-7, 346-54); but nothing outside such boundaries was touched upon by anyone.

Subsequent opinions of the Solicitor of the Interior Department and the Assistant Attorney General were to the effect that the Indians had no right within such exterior boundaries against Respondent's title (W. P., 319-27).

The Peach Springs judgment was entered in July, 1931, upon stipulation (R. 65-66) reading in part:

> "• • • and said The Atchison, Topeka and Santa Fe Railway Company and/or Santa Fe Pacific Railroad Company, a corporation organized and existing under the laws of the United States, all of the capital stock of which, except directors' qualifying shares, is owned by said The Atchison, Topeka and Santa Fe Railway Company, having reached a satisfactory understanding and agreement with the United States of America for the Use and benefit of the Walapai or Hualapai Indians pursuant to authority contained in the Act of Congress of February 20, 1925 (43 Stat. 954), entitled 'An Act to provide for exchanges of Government and privately owned lands in the Walapai Indian Reservation, Arizona,' for the exchange and consolidation of large areas of lands of the respective parties, including the lands and waters concerned in this action, lying within the Walapai or Hualapai Indian Reservation in the State of Arizona, the plaintiff and the defendant in the action above numbered and entitled do hereby stipulate, subject to the approval of the Court, that judgment shall be rendered for the Plaintiff in this cause fixing the respective rights and titles of the parties as follows."

On June 13, 1932, the Senate tabled a joint resolution proposed by Senator Frazier which, if passed, would have directed delay in consummating the exchange agreement. On June 17, 1932, Senator Frazier himself wrote the Secretary of the Interior requesting delay and further study (W. P., 356). This action was instituted June 28, 1937 (R. 24), and resolved in so far as present title to first cause lands are concerned by Respondent relinquishing them under the Transportation Act of 1940 (Appendix, 78).

E. *Summary Comment.*

The complex of history we have reviewed should be judged as a whole. Many of the acts of Congress and the Executive are so plain that they are not to be mistaken and are alone effective to prove our points; nevertheless, all are manifestations of a single policy which denies all Walapai right to the lands here involved and confirm Respondent's right and title. The formation and application of this policy was and is exclusively a political matter. "Save to the extent that Congress may authorize, the government's dealings with Indian tribes are not subject to judicial review." *Klamath Indians* v. *United States*, 296 U. S. 244, 255 (1935). "To give the relief now sought it would be necessary to render a judgment predicated upon the abrogation of express provisions of the treaties and statutes concerned and the substitution for them of other provisions which Congress has never enacted or authorized. These are political, not judicial powers." *Sioux Indians* v. *The United States*, 277 U. S. 424, 436 (1928). "The propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy." *Beecher* v. *Wetherby*, 95 U. S. 517, 525 (1877).

The history reviewed requires the adoption of the process and, if the Walapai ever had rights, the application of the holding of *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937), in which Mr. Justice Brandeis for the Supreme Court reviewed the long history of dealings which were claimed to show that the United States disregarded Shoshonean rights by introducing Arapahoes onto lands guaranteed to the Shoshoneans by treaty, and said (495-6):

> "* * * Looking at events in retrospect through the long vista of the years * * * the outstanding fact remained that for good or for ill, the Arapahoes were to dwell upon the soil along with them. 'The adoption by the United States of the wrongful act of any officer

> is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.' *Croizer* v. *Krupp*, 224 U. S. 290, 305."

Accordingly, if at some time in the past Walapai rights could have been asserted, they can not be advanced now. *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935). Conveyances honestly and deliberately made can not be rescinded. *Sinking Fund Cases*, 99 U. S. 700, 718-19, (1878); *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 680, (1914); *United States* v. *Northern Pacific R. Co.*, 256 U. S. 51, 64, (1921); *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228, 238 (1921).

Congress itself has made no effort to change its policy of non-recognition of the Indian claims and confirmation of Respondent's rights. The Indians' counsel ask this Court to legislate a different policy.

VII.

The Secretary of the Interior, Duly Empowered by Congress, Has Conclusively Adjudicated Respondent's Right to the Lands in Issue.

Laying aside all other considerations, nevertheless the motion to dismiss was properly granted because the complete title to all of the lands in question has been adjudicated by the Secretary of the Interior, pursuant to Congressional direction, to be in Respondent. The trial court so held (R. 195), and the point was urged in the Circuit Court of Appeals, but not there considered in the opinion.

As to second cause lands, all now in issue are patented [15]

15. While it has been assumed by both sides throughout that all second cause lands were patented (Brief, p. 4), recent investigation by Respondent indicates that patents have not issued as to some second cause lands. The point is mentioned for precision only. It is immaterial as such lands have been now quitclaimed to the United States (Appendix, 78). Re-

Such patents were issued to Santa Fe Pacific Railroad Company (R. 18), subsequent to March 3, 1897, the date of the Act (29 Stat. 622) under which Respondent was incorporated. See Act of June 27, 1902 (32 Stat. 405; Appendix, 60). The patents are full evidence of Respondent's beneficial ownership to all second cause lands now in issue. *Burke* v. *Southern Pacific Ry. Co.*, 234 U. S. 669. An Indian right of occupancy is as valuable as the fee, and where present superimposed upon the fee deprive the later title "of every beneficial incident." *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, at 116. The patents were issued pursuant to determination of Respondent's right thereto by the Secretary of the Interior, required by the Act of March 3, 1887 (24 Stat. 556; Appendix, 47). Such determination by the Secretary of the Interior was conclusive and not subject to review or revision by a judicial tribunal. *Butte A. & P. Ry.* v. *United States*, 290 U. S. 127. That case involved Section 204 of the Transportation Act of 1920,[16] which provided for payments to any carrier of a specified class "which sustained a deficit in its railway operating income" during a control period as compared with a test period. The Butte Company made claim; the Commission held that the term "deficit" meant earnings less in the control period than in the test period, and certified an amount to the Secretary of the Treasury, which was paid. Some years later the Commission reversed its

spondent asserts no claim to lands in issue except under the Granting Act, and petitioner seeks no relief as to second cause lands not patented, if any there be, except a decree quieting title as against that claim. As to unpatented second cause lands the case is now in the same category as first cause lands.

16. The Transportation Act provided:

"* * * the Commission shall ascertain for every carrier * * * its deficit in railway operating income, if any. * * *" (Sec. 204 (e), Transportation Act, 1920, 49 U. S. C. A., Sec. 73.)

The Adjustment Act provided:

"* * * the Secretary of the Interior * * * is hereby authorized and directed to immediately adjust, * * * each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted." (Act of March 3, 1887, 24 Stat. 556, Appendix 47.)

construction, and held that "deficit" meant "red ink" deficit only, and issued an order cancelling the prior certification to the Treasury of the Butte claim. The United States sued the Butte Company to recover the payment. The United States prevailed in the lower court, the Circuit Court of Appeals affirmed, 61 F. (2d) 587, at 591, holding the latter construction of "deficit" to be correct. Upon appeal, this Court held that there was no occasion to determine which construction was correct:

> "The government cannot recover, because *when Congress, by Sec. 204, imposed the duty to certify the amounts severally due to carriers, it required the commission—and hence authorized it—to determine whether the claimant was entitled to relief.*" (p. 136, italics supplied.) • • •
>
> "In deciding any one of the enumerated questions of construction as in other rulings of law or findings of fact the commission may err." • • •
>
> "Since authority to pass upon the meaning of the word 'deficit' and upon each of the other questions of construction, is essential to the performance of the duty imposed upon the commission, and Congress did not provide a method of review, we hold that it intended to leave the government as well as the carriers, remediless whether the error be one of fact or law." (pp. 142-3.)

West v. *Hitchcock*, 205 U. S. 80, 84, is in accord as to determinations required to be made by the Secretary of the Interior. The Adjustment Act of 1887, and the Transportation Act, parts of which are above set out in parallel columns (Note 16), each manifest an identical attempt to confer a power and duty of decision. The Adjustment Act of 1887 contains internal evidence of Congressional intent to make the future determinations of the Secretary final. The first section (unnumbered) directs the Secretary to adjust the land grants if heretofore unadjusted. Section 2 provides for cancellation where lands have been *heretofore* "erroneously certified or patented." Nothing

decided in *United States* v. *Southern Pacific Railway Company*, 184 U. S. 49, 55, is to the contrary as Sections 4 and 5 only were there involved. Nor is anything in *Logan* v. *Davis*, 233 U. S. 613, in opposition. Section 4 was there involved. The statement in the latter opinion that *United States* v. *Southern Pacific Railway Company, supra*, referred to the language of Section 2 (p. 627), is clearly in error.

While patents conclusively evidence the Secretary's determination, they are not the only way in which it may be made evident. His decision is not a matter of any particular form, and once made known, a court will not make an inquisition into his mental processes to see whether his reasons were correct. *West* v. *Hitchcock*, 205 U. S. 80.

As to the first cause lands, public records (W. P. 326) show that his determination was made in 1919.[17]

The Secretary, having determined the full beneficial title to be in the Respondent, the determination may not be reviewed in any judicial proceeding. *Butte, Anaconda & P. Ry.* v. *United States, supra; West* v. *Hitchcock, supra.* Constitutional objections with regard to deprivation of property rights are not available for the protection of the claimed right of these Indians. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

17. In 1919, the Commissioner of the General Land Office desired a survey of this tract and inquired of the Secretary of the Interior as to funds for that purpose. The Secretary consulted the Commissioner of Indian Affairs, who made claim to all of the tract for the Indians. On October 2, 1919, the Secretary advised the Commissioner of the General Land Office:

"'This matter has been given careful consideration * * * and conclusion reached that there is no such Indian claim as prevents the railroad grant from attaching to these lands; * * *.'

"On October 20, 1919, the Secretary made demand upon the railroad company to deposit its share of the cost of the survey under penalty of forfeiture of its grant.

"On December 27, 1919, the Indian Commissioner protested the ruling, and on January 26, 1920, the Secretary replied that *the matter had been reviewed and the unanimous conclusion of the officers of the department was*—

"'*That the railroad has full, complete, and incontestable title to the odd-numbered sections in this reservation and embraced in the grant limits.*'" (W. P., 326, emphasis supplied.)

VIII.

The Walapai Can Claim No Right Stemming From the Laws of Spain and Mexico.

Petitioner contends that the laws of Spain and Mexico are "irrelevant" (Brief, 61), and rests its case on statutes of the United States and decisions of this Court (Brief, 59). It follows that the Walapai were given or denied rights dependent upon the sovereign will of the United States; and this same position of Petitioner, that the title of the United States was "originally absolute" (R. 207), relieved the Circuit Court of Appeals of meticulous inquiry into the laws of Spain and Mexico and released it to an inquiry as to what Congress had done with respect to the particular lands and particular Indians in question. This inquiry the Court made (R. 210); and it did not, as Petitioner claims, "advance an argument" that Indians' rights were to be measured by Spanish or Mexican law, or advance any other "argument" respecting such law (Brief, 59).

The Spanish and Mexican law is, under the case presented, important as a demonstration that the United States' title was absolute, in a political as well as strictly legal sense, and also because it is demonstrable that Congress inquired to ascertain what rights Indians such as the Walapai enjoyed under such laws, and determining that they enjoyed no right, a determination binding on this Court, felt free to deny and did deny to the Walapai all rights to land except to lands assigned to them.

The rights of Mexico as a nation, and the rights of Indians and other inhabitants of Mexico, whatever they may have been, under Spanish and Mexican laws, were not protected by the due process clause of our Constitution, or by the courts of the United States, from such conquest or other disregard as they might be subjected to by the political branch of the United States Government. Only rights

vested under the laws of the United States become protected by the Constitution. Rights outside those laws are protected by the practices of nations; but the courts of this nation can not question what is done by the political arm.

The Treaty of Guadalupe Hidalgo (Appendix, 3) was an agreement between nations following a conquest. The covenants of the United States with Mexico with respect to protection of vested rights of Mexicans, and taking measures in removing Indians like the Walapai, and settling the lands they occupied, were political covenants, unenforceable in courts until Congress should give courts jurisdiction or until Congress should so proceed under them as to vest rights under our domestic laws.

As Mr. Justice Holmes said in *Carino* v. *Insular Government*, 212 U. S. 449, 458, what is important is, not so much actual rights enjoyed under a prior sovereignty, but what the United States has asserted to be such rights, or lack of them, and what the United States has decided to protect or not to protect.

Courts are not authorized to inquire as to whether Congress' dealings with lands of the Mexican cession may have been in violation of the treaty of cession; for a violation would be "a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This Court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. *The Cherokee Tobacco*, 11 Wall. 616; *Taylor* v. *Morton*, 2 Black 481, affirming 2 Curtis, 454 Fed. Cases No. 13799; *Head Money Cases*, 112 U. S. 580, 598; *Whitney* v. *Robertson*, 124 U. S. 190, 195." *Botiller* v. *Dominguez*, 130 U. S. 238, 247.

Congress required all claims to California lands, based

on the laws of Spain and Mexico, to be presented to a specially constituted court; and those not presented within a two-year period were wiped out. *Botiller* v. *Dominguez, supra; Barker* v. *Harvey*, 181 U. S. 481. Congress reserved to itself all consideration of claims in Arizona and New Mexico until 1891; and during that period no court had jurisdiction to consider them, since such claims were political claims without the jurisdiction of courts until Congress should define the rules by which they might be established and the jurisdiction of a court to consider them; and decisions by Congress were final, *Tameling* v. *United States Freehold etc. Co.*, 93 U. S. 644, 662-3; *Astiazaran* v. *Santa Rita Mining Co.*, 148 U. S. 80, 81-4; *Maxwell Land-Grant Case*, 121 U. S. 325, 366, and 122 U. S. 365, 371. In 1891 Congress established a tribunal, requiring that all claims and titles *not perfect* should be presented to it within two years, or be forever destroyed (Appendix, 51). An Indian claim, as the present one, based on factual allegations and without support in any formal title documents of any kind, is an imperfect claim; and the Walapai never presented such claim as they may have had under Spanish and Mexican law to that tribunal or to Congress, which alone had jurisdiction to determine it. The jurisdiction of the tribunal established in 1891, together with the Court itself, has long since disappeared. The Walapai claim, if ever it could have been asserted as a justiciable claim under Mexican or Spanish law, is now only a political claim, as it was prior to 1891—a claim to lands long since legally vested in Respondent by acts which may not constitutionally be recalled.

During all the years of its existence as a political claim (and here we assume without foundation for assumption the existence of a claim), the Congress manifested a determination not to recognize any Walapai claim, or create a legal and justiciable Walapai right to any of the lands here claimed. This history has been minutely reviewed

and will not be repeated here. Our point now is that the Mexican and Spanish law are immaterial except as explanation for the political motivation of Congress. A study of these laws was made for the courts below, and another is presented for the benefit of this Court in a separately bound part II of this brief, of which Dr. Max Radin is the author.

IX.

Petitioner's Theory That Under the Law the Walapai Had an Exclusive Right to All Lands Claimed and Possessed by Them, Valid Against All Except the United States, Is Unsound Because—

A. *The Indian Theory Is Based Upon a Mistaken Generalization of History.*

In approaching this case, it is necessary to answer, not the question of what the sovereign should have done, not what the sovereign did with respect to any Indians other than the Walapai, not what the sovereign has done in making the Walapai wards and providing gratuity appropriations, but the precise question of what rights to lands Congress has accorded the Walapai. This determinative question counsel for the Indians do not answer. Treaty and statutory rights of other Indians are pointed to. The ethical and moral concepts behind legislation and treaties provided for other Indians in other territories are used in an effort to create Walapai rights to the land in issue. This right asserted for the Walapai is "based on immemorial possession" (Brief, 14), is held "by reason of aboriginal occupancy" (Brief, 17). "Actual possession from time immemorial gives rise to" this right; and the rule is general (Brief, 29). In short, possession, a fact, creates a legal right; and this must be true whether or not the sovereign, the source of all legal rights, creates such a right or not, for the reason that the Walapai are said to enjoy this right

though the sovereign has not given them a right to the particular lands claimed for them. This reasoning stands in marked repugnance to the actual course of history and the actual dealings by the sovereign source of titles. As said by Mr. Justice Holmes in a realistic appraisal, "whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land." *Carino* v. *Insular Government*, 212 U. S. 449, 458 (1909). This purpose was effectuated in many ways. Varying protection was given to the Indians in varying localities, dependent upon their relative power and a variety of other considerations and circumstances. What rights any group of Indians had or have depends, not upon a universal absolute but upon what had been given them by the source of all legal rights.[18] We have demonstrated that the Walapai were not given any rights to the lands now claimed for them.

As used by Petitioner, the phrases "immemorial possession" and "aboriginal right of occupancy"[19] are "perni-

18. The point was well made, by Mr. Chief Justice Taney, speaking of a treaty reservation. He said:

> "It is true that it is occupied by the Tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the consent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians held to be, and treated as, subject to their dominion and control." *United States* v. *Rogers*, 4 How. 570, 572 (1845).

19. The thought that "immemorial possession" gives aborigines legal rights against a sovereign and its subjects without action by the sovereign creating legal rights, is ill-founded but persistent. It sprang from theoretical writings and a relatively late but widespread practice of the English sovereign and his successors in political power, to create Indian possessory rights by legislative action. It found expression as a result of the tendency of early courts to describe legislative action in terms of universal moral principle.

As a matter of fact, up to 1763, "'English civilization scorned and neglected the Indian,' at least so far as it relates to his possessory right." *Eighteenth Report of the Bureau of American Ethnology*, Part II, p. 550. Until late years aborigines generally were widely treated as something less than human: the slave trade was not ended until 1830. (A. H. Snow,

ious abstractions," taken from misunderstood dicta, and used to weave a "web of unreality" obscuring clear outlines of pertinent history and law. *Graves* v. *New York*, 306 U. S. 466, 490. There have been cases dealing with other Indians, other places, and other times, and with statutes and treaties not pertinent here, in which the result was properly and unavoidably that the Congress had by law, directly or through agents exercising delegated power, given legal rights to Indians to possess all lands occupied, or part of lands occupied, or even lands never occupied by them prior to the grant of rights. If, in some decisions, "partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes," (*Ibid.*, 489) judges described the acts of legislatures in terms of high and universal moral principle, such expressions were nothing but descriptions of what the political power had elected to prescribe as law, for the particular lands and Indians before the Court, and were not then or since limitations upon the sovereign's perfect power to

The Question of Aborigines in the Law and Practice of Nations, a report to the Department of State, Government Printing Office, 1919.)

More lenient French treatment made Indians French allies in the French and Indian war; and at the end of that war, for obvious reasons, the English sovereign inaugurated a new policy (*Bureau of American Ethnology, Eighteenth Report, supra*, p. 558), defining, by the proclamation of 1763, areas in which Indians were to have possessory rights and in which white intrusion was forbidden. Treaties were also negotiated. *Mitchel* v. *United States*, 9 Pet. 711; and by the time the Colonists rebelled, they had cause to complain in the Declaration of Independence that the King had used his new Indian allies against his white subjects.

After independence, the Congress of Confederation followed the pattern of the Proclamation of 1763, giving Indians certain possessory rights by Act of September 22, 1783 (*Bureau of American Ethnology, Eighteenth Report, supra*, p. 553). There later followed the Northwest Ordinance, and various other statutes and treaties relating to various territories and various Indians (Appendix, 75-79).

As the creation of Indian rights in the first instance was prompted by political weakness, increasing strength caused rapid destruction of rights already created, and a cessation of creating new ones. As early as 1823, Indians east of the Mississippi had been removed by force and the lands parceled out to settlers. *Johnson* v. *McIntosh*, 8 Wheat. 543, 589. Many Indians of the West were never given rights at all, except in reservations created by statute or treaty. Of such are the Walapai. In every case the rule of decision by courts has been, and necessarily must always be, what "our own government has adopted in the particular case, and given us as the rule of our decision." *Johnson* v. *McIntosh*, *supra*, at p. 572.

enact different laws applicable to other peoples and territories.

Certainly the Walapai have no rights to the lands here in issue; because there can be no doubt, as we have heretofore demonstrated, that Congress not only gave them none but affirmatively willed that they should not have any.

B. *None of the Cases Cited by Petitioner, Correctly Analyzed to Determine Exactly What They Hold, Supports the Theory.*

Petitioner has been unable to cite a single case in which a tribal claim to any particular lands has been sustained when that claim was not based upon the provision of a treaty, a statute, or an executive order. We assert with confidence that no such case emanating from this Court can be produced. We will analyze the cases cited.

Johnson v. *McIntosh*, 8 Wheat. 543 (1823, Brief, 15, 17), was decided against the background of rights theretofore created by legislative acts. The actual holding of this case is shown in its short syllabus:

> "A title to lands, under grant to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773 and 1775, cannot be recognized in the courts of the United States."

The rule of decision is that which "our own government has adopted in the particular case, and given us as the rule for our decision." (p. 572.) The Court points out that "all the nations of Europe * * * have asserted * * * the exclusive right of the discoverer to appropriate the lands occupied by the Indians." (p. 584.) The United States owned the fee of the lands in question; had given to the Indians in question the legal right to occupy; but, nevertheless, with respect to other Indians had already exercised its conqueror's power as far as the Mississippi (1) by the

sword and (2) by permitting the Indians to be crowded out, subsequently parcelling out the lands. "It is not for the courts * * * to question the validity of this title, or to sustain one which is incompatible with it." (p. 589.) The case goes in discussion far beyond what was required by the issue; the opinion tends to generalize legislative acts into a universal "principle"; but the discussion above quoted supports Respondent, and does not even suggest that the courts should give the Walapai rights withheld and denied by the Congress.

Worcester v. *Georgia*, 6 Pet. 515 (1832, Brief, 19), held that, Great Britain and the United States having by treaties recognized the Cherokee as a self-governing nation, and created in them legal rights to land, the Cherokee territory was held to be not subject to Georgia laws. Specifically, it was held that Georgia had no power to forbid and penalize entry into Cherokee country without license from Georgia. The case involves only application of the Constitution, laws, and treaties of the United States which had, with respect to the Cherokee, created both legal and political rights. The opinion makes it clear that the sovereign need not have created these rights, and that the Court's language and holding are simply applications of the rights created by the sovereign:

> "But power, war, conquest, give rights * * * which can never be controverted by those on whom they descend." (p. 543.)
>
> "A more conciliatory mode was preferred. * * *." (pp. 579-80.)
>
> "We have made treaties with them; * * *. By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us?" (p. 582.)

This case can have no effect to create rights in the Walapai, whom the soverign has never recognized as a nation, and to whom the sovereign has never conceded

rights to land. Neither does it establish that Arizona does not have full political power over northwestern Arizona, and the balance of the State, over all of which Walapai and similar Indians once roamed.

The case of *Mitchell* v. *United States*, 9 Pet. 711 (1835, Brief, 20) settled a controversy between the United States and the private owners (not Indians) of a grant made by Indians and by Spain. The Indians in question enjoyed rights to the lands which they and the Spanish sovereign conveyed, by treaties. The case demonstrates that Indians enjoyed only such rights as were created in them by the sovereign. The English laws and treaties during the period 1763 to 1783, when the territory was governed by Great Britain, accorded possessory rights to the Indians in question, and forbade white men to trespass or trade without license (pp. 745-6):

> "By thus holding treaties with these Indians, accepting of cessions from them, with reservations, and establishing boundaries with them, the King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties." (p. 749.)

The King of Spain, taking possession in 1783, because of his own weak tactical position, found it necessary to enter into treaty relations with the Indians and give them property rights "which had not before been done in any of his dominions." (p. 753.)

> "* * * When they [the United States] acquired these provinces by the treaty of cession, it was not stipulated that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain; nor is there the least reference to any intended change in the relation of the Indians towards the United States. * * * They could assume

> no right of conquest which may at any time have been vested in Great Britain or Spain, for they had been solemnly renounced, and new relations established between them by solemn treaties; * * *." (p. 754.)

The *Mitchel* case is an extremely useful laboratory for determining the process to be applied in a correct decision of this case. The territory ceded in 1848 was of those "dominions" in which the Spanish King had created no Indian rights and had found it possible to ignore loose Indian "pretensions that the Spanish government notoriously disregarded, further than a cautious policy required." *Marsh* v. *Brooks*, 14 How. 513, 523 (1852). The Indians had no rights, then, when they came into the United States, and our own laws have not granted them rights to the lands here in issue.

Chouteau v. *Molony*, 16 How. 203 (1853 Brief, 21). Dubuque purchased from the Fox Indians a right to certain mines, and subsequently obtained what his assignee claimed was a grant from the Spanish Governor. The issue was whether or not this concession from the Governor was a complete title to the land. It was held that it was not. The mining laws of Spain were considered, together with the formalities usually accompanying grants of land. The terms of the "purchase" from the Indians were considered as important in determining the intent of the Governor. There was an extensive review of the practices of the Spanish Governors in Louisiana, and the various instructions given under authority of the King from time to time. The precise foundation of the Indian rights is not disclosed; but the Court does state that "Spain at all times, or from a very early date, acknowledged the *Indians' right of occupancy* to these lands * * *." (Emphasis ours.) Here again we see specifically conferred rights in specific territory, a territory where the King's policy of liberality, bred of the caution inspired by a dangerous situation, was in notorious contrast to his policy where a "cautious policy"

did not require. Most of the Fox Indians' rights or claims were taken away by a treaty by which the United States concluded a successful war against them. 7 Stat. 374.

Holden v. *Joy*, 17 Wall. 211 (1872, Brief, 21), did not involve any "rule with respect to aboriginal possession." The contest was between Joy, a purchaser from the Government, and Holden, a homestead claimant. The land was included in that which the United States had by treaty agreed, in consideration of the Cherokee among other considerations moving from lands previously owned by treaty and also paying $500,000, "to convey to the said Indians and their descendants, by patent in fee simple, a certain tract of land * * * estimated to contain eight thousand acres * * *." (p. 238.) This treaty was dated December 29, 1835. The lands were surveyed, and patent issued December 1, 1838 (p. 246). By treaty of July 15, 1866, the Cherokee reconveyed the lands to the United States, to be sold for Cherokee benefit (p. 248). The land was sold to Joy; but Holden had, subsequent to July 15, 1866, become a homstead settler. Joy prevailed. There are details of the history which we omit; those sketched suffice to show the issue involved.

The Court recited the many treaties that had been made with the Cherokee; and why it wrote the metaphysical dictum quoted by Petitioner is not explainable. The Court cited for the passage reproduced by Petitioner (Brief, 21-22) only *Mitchel* v. *United States*. Perhaps the more appropriate statement of Petitioner's position appears at page 243 of the report:

> "Beyond doubt the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, * * *."

Concerning *Buttz* v. *Northern Pacific Ry. Co.*, 119 U. S. 55 (1886, Brief, 22), the Petitioner is in error in stating

that it applied any rule "to the protection of Indian aboriginal occupancy." The exact issue in the case was between the railroad and a settler, and the question of Indians' rights was only collaterally involved.

The settled beginning point in this case is what is at issue in this; for admittedly, the lands in dispute in the *Buttz* case were "in what was known as Indian Country." (p. 66.)

The treaty with the Sioux, made in 1867, prior to the filing of the Northern Pacific map of definite location, recited the background history as follows (15 Stat. 505):

> "Whereas Congress, in confiscating the Sioux annuities and reservations, made no provision for the support of these, the friendly portion of the Sissiton and Warpeton bands, and it is believed (that) they have been suffered to remain homeless wanderers, frequently subject to intense suffering from want of subsistence and clothing to protect them from the rigors of a high northern latitude, although at all times prompt in rendering service when called upon to repel hostile raids and to punish depredations committed by hostile Indians upon the persons and property of the whites; and
>
> "Whereas the several subdivisions of the friendly Sissiton and Warpeton bands ask, through their representatives, that their adherence to their former obligations of friendship to the government and people of the United States be recognized, and that provision be made to enable them to return to an agricultural life and be relieved from a dependence upon the chase for a precarious subsistence: * * *"

The Treaty in Article IV recites:

> "It is further agreed that a reservation be set apart for all other members of said bands who were not sent to the Crow Creek reservation, and also for the Cut head bands of Yanktonais Sioux, a reservation bounded as follows, viz.: * * *" (p. 506.)

The "policy of maintaining just and peaceable relations with the Indians," which was undoubtedly behind the

action of Congress in making the treaty with the Sioux, were considerations for Congress to entertain and act upon or not act upon. The court in the *Buttz* case did not entertain such considerations as a reason for its decision except as such considerations had been acted upon by Congress; for such considerations are purely political and non-judicial. Congress had the option with respect to both the Sioux and the Walapai of making a treaty recognizing Indian claims and avoiding war, or of not making a treaty, refusing to recognize Indian claims and of enforcing its sovereign will if need be by war. It chose the former alternative with respect to the Sioux and the latter with respect to the Walapai. The Walapai were capable of waging war, and did so unsuccessfully.

Cramer v. *United States*, 261 U. S. 219 (1923, Brief, 24). The exact issue decided was that approximately 150 acres, occupied, fenced, and cultivated since 1859 by an Indian family, which had abandoned all tribal relations, was totally excepted from the Act of July 25, 1866 (14 Stat. 239), as land "reserved or otherwise disposed of." The case did not involve land actually passing by grant and alleged to be encumbered with a "possessory right." The decision turned upon practices, instructions, and decisions of the Land Department requiring respect for individual Indian occupancy, which are held to have the legal effect of reserving or disposing of land so occupied. These practices are summarized by Secretary of the Interior Hitchcock, as follows (quoted from the decision below, 276 Fed. 78, 80):

> "This Department has uniformly respected the occupancy of Indians upon the public lands living apart from their tribes, and has, by circular, directed the register and receiver of the several land offices to peremptorily refuse all entries of filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon (see cir-

cular of May 31, 1884, 3 L. D. 371; reissued October 26, 1887, 6 L. D. 341), and has held that such lands are not unappropriated lands within the meaning of section 2289 of the Revised Statutes and are therefore not subject to homestead entry. See *Ma-gee-see* v. *Johnson*, (30 L. D. 125.)"

The Supreme Court decided these individual Indians rightfully occupied lands actually cultivated and fenced by them, but did not rightfully claim lands not cultivated and fenced but used. Mr. Justice Sutherland said (p. 227):

"That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight."

The language quoted by Petitioner (Brief, 25) is dictum advanced *arguendo*. Its citation of *Beecher* v. *Wetherby* and *Minnesota* v. *Hitchcock* are aids to its interpretation; for these cases are only interpretations and applications of treaties and statutes not here applicable, giving and modifying Indian rights in territories not here in issue. Mr. Justice Sutherland did not mean, we believe, that the Walapai have rights Congress has not granted; and if he did, his dictum is wrong. The case does not establish that "immemorial possession" gives legal rights which the sovereign has chosen not to concede.

United States v. *Shoshone Tribe of Indians*, 304 U. S. 111 (1938, Brief, 16, 26), did not involve "the character of Indian occupancy rights" as Petitioner uses the term. The case is a sequel, on the issue of damages only, to *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937), opinion by Mr. Justice Brandeis. The only jurisdiction which the Court was given by the Jurisdictional Act, quoted at 299 U. S. 484, footnote, was to adjudicate "all legal and equitable claims which the Shoshone Tribe * * * may have against the United States arising under or growing out of the treaty of July 3, 1868 (Fifteenth Statutes, page 673), or arising under or growing out of any subse-

quent treaty of agreement * * *." By the treaty mentioned the United States "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * * and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." As stated by Mr. Justice Brandeis (page 493), "Under the jurisdictional act the court is to inquire whether the violation of the treaty of 1868 or some later treaty or agreement or some later act of Congress has given rise to legal or equitable grounds of liability." This issue and this issue alone was presented; and no question of rights arising other than from treaty, and from "aboriginal occupancy" as a fact only, can be found in the case.

The two opinions demonstrate that the Walapai have no rights. In a history no more marked by denial of Shoshonean and confirmation of Arapaho right than the history we recite is marked by denial of Walapai right and confirmation of Respondent's rights, the Arapaho were held to have acquired the rights that Shoshones once had. (299 U. S. 495-6; 304 U. S. 115-116.) The United States having taken from the Shoshones their solemnly guaranteed treaty rights, they no longer possessed such rights. They did not upset the disposition of their former property by the Sovereign. That disposition was final because a result accomplished in the exercise of sovereign power. The Shoshone had only a right of action against the United States.

Leavenworth, Lawrence & Galveston R. R. Co. v. *United States*, 92 U. S. 733 (1875, Brief, 27). In this case the Indians had had a technical reservation since 1825. This land was held not included in a railroad grant which was a present grant of public lands, and which excepted from its operation lands reserved for any purpose.

Wilcox v. *Jackson*, 13 Pet. 498 (1839, Brief, 27), held that land on which Fort Dearborn (Chicago) was located

ould not be acquired under the preemption laws because t had been made a military reservation, and also a reservation for Indian purposes, and for a lighthouse. The making of such "reservations" is the process by which lands are withdrawn from the application of the land laws, such as preemption laws, donation laws, and the Granting Act here in issue (at 513). We locate nothing in this decision to sustain Petitioner, but much to destroy its position.

Beecher v. *Wetherby*, 95 U. S. 517 (1877, Brief, 27), established that certain lands passed to Wisconsin by its school grant, though at the time of the grant the lands were held by Indians under a treaty (Indian rights were not directly in issue). "For many years before Wisconsin became a State, that tribe [Menomonee] occupied various portions of the territory and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty boundaries of land claimed by different tribes of Indians as between themselves, and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case." (p. 525.) The Indians involved in the *Beecher* case had treaty rights; accordingly, the case merely emphasizes by contrast that the Walapai were never accorded similar rights by treaty or otherwise, but were denied them by the many laws and their administration which we review.

Spalding v. *Chandler*, 160 U. S. 394 (1896, Brief, 27), was a decision that an Indian reservation established at Sault Ste. Marie under treaty with the Chippewas, June 26, 1820, continued as a reservation until extinguished by a treaty dated August 2, 1855, with the same tribe, and that because of reservation, the lands were not subject to pre-

emption. The discussion upon which Petitioner probably relies had reference to statutes and treaties by which the political arms of the Government had in various territories, but not for the Walapai and not for many others, "from the formation of this government," created Indian possessory rights. The language should not and can not be understood to mean that Indians have possessory rights whether granted to them by the sovereign or withheld.

Minnesota v. *Hitchcock*, 185 U. S. 373 (1902, Brief, 27). "Prior to the treaty of October 2, 1863, the boundaries of the lands occupied by the Chippewa Indians had been defined by sundry treaties, and by that treaty a large portion of the lands thus occupied were ceded by the Indians; * * * the effect was to leave the Indians in a distinct tract reserved * * *." (p. 289.) The case contains no possible support for Petitioner. The issue lay between the United States and Minnesota. The lands were lands secured to the Chippewas by treaties, and later conveyed to the United States to be sold for Indian benefit. The Court held, on a construction of treaties and statutes, that the Minnesota school land grant did not attach.

C. *The Extension of the Laws of the United States to Arizona Did Not Vest in the Walapai Title to Any Lands.*

We will analyze Petitioner's argument that by the extension of the trade and intercourse laws (Brief, 36-40), and the fact that this Court has applied those laws to reservations actually established under the laws of Congress (Brief, 30-36), the Walapai have rights to occupy, not only the lands which have been given them, but other lands, to-wit, those in controversy here.

From the bare premise that the Act of 1850 extended the laws of the United States, and the Act of 1851 "declared the Indian trade and intercourse laws to be in force

in that territory" (Brief, 36-40), is built the conclusion that Congress created possessory rights in the Walapai and other Arizona Indians coincident with aboriginal possession, and outside of their reservations. This position will not bear analysis. The Act of 1850 extended the laws of the United States which were "not locally inapplicable." The Act of 1851 extended the Indian intercourse laws, "or such provisions of the same as may be applicable." Neither gave Indians property rights, or defined what right they might have had. Congress was plainly extending the laws that forbade selling liquor to Indians, extending to Pueblos (already known to be possessed of rights to land) the protection which Petitioner earnestly demonstrates that they have been accorded, and providing for the application of the intercourse laws to any circumstance to which they might be or might become applicable. No one doubts that when Executive order reservations were provided, some of the intercourse laws became applicable; by the same token, no one can rationally dispute the intercourse laws are not in effect outside of Indian reservations. There is a State of Arizona with full governmental power. There is white ownership. Settlers settled on the lands by invitation of Congress and received patents. They drove their stock and were not liable to pay $1.00 each time a head of their cattle grazed on Arizona land.

The laws claimed to have been extended, to which importance is attached (Appendix to Petitioner's brief, pp. 1-4) are:

> SEC. 9. Persons driving stock on land "belonging to any Indian tribe" without its consent are fined. This is not a grant of lands to Indians or a definition of lands "belonging." To the Pueblo lands this law was "applicable"; if to other lands, only upon demonstration of ownership not demonstrable by the intercourse laws.
>
> SEC. 10. The Indian Department officials are given authority to remove persons unlawfully in the "In-

dian Country." The "Indian Country" is undefined. No grant of rights to specific Indians is made, and no definition of the bounds of "Indian Country" is given. Congress made by other acts all the "Indian Country" in Arizona; and it includes none of the lands in this litigation.

SEC. 11. Persons settling on, surveying, or marking trees on "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe" are punished and subject to expulsion by military force. Perhaps the Pueblo lands qualify under this section; but Petitioner has shown no treaties had been made in 1851 securing lands to any New Mexico or Arizona Indians other than Pueblos.

SEC. 12. Conveyance of lands or any title or claim thereto by Indian tribes or nations is required to be by treaty with the United States. This does not grant titles, or define where they exist or in whom.

SEC. 22 shifts the burden of proof, in trials of right of property between "an Indian" and "a white person," to the white person when the Indian shall make out a case of possession. What relation this section can have to a tribal claim, or the merits of any title, or to anything except procedural matters in a case between individuals, we are unable to imagine.

SEC. 23 authorizes removal by military force of persons in the "Indian Country" unlawfully, provides for seizure of property unlawfully introduced therein, and requires that the whites shall be "humanely treated" when deported. Indian country is left for definition to other actions by Congress or its authority.

It is self-evident, we submit, that the extension of United States laws, in so far as applicable, did not provide either land or Indian policies. Such policies were left to be evolved in other acts, which must be examined if the land or Indian policy is to be ascertained. The answer from them is plainly against the Indians.

The fallacy in counsel's treatment of the Indian intercourse laws is apparent again in the argument center-

ing around the decisions of this Court applying them (Brief, 30-36).

Petitioner cites cases holding that the Pueblo Indians, who had Spanish grants confirmed by Congress, and California Indians on an executive order reservation, were under guardianship and subject to the Indian laws. From this premise it is thought to follow that the Walapai, who had no Spanish grant but do have reservations created for them, must have rights greater than their reservations.[20] Though Pueblos are permitted only lands granted by Spain and confirmed or granted by the United States, and Hoopa Valley Indians have only a reservation, the Walapai, Petitioner argues, are entitled not only to what the United States have given them but to vast possessions for which they can show no concession from any sovereign.

Counsel assert that in *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, this Court "rejected" the "argument that because these Indians had received no written documents of title they did not constitute 'Pueblos' and had no capacity to bring suit to defend their land claims" (Brief, 34). We challenge the position that this Court held that the Papagoes had title notwithstanding they had no grant from Spain or Mexico, or rejected the "argument" in any manner disposing in one way or another of its merits. The case can not be regarded as a "decision of this Court upholding the substantive rights of these Papago Indians" (Brief, 34).

It is claimed that, in *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, "this Court held that the unproved claims of these Papago Indians to lands aboriginally occupied was within the scope" of the law requiring contracts to be ap-

20. In support of this astonishing position, *United States* v. *Chavez*, 290 U. S. 357, *United States* v. *Sandoval*, 231 U. S. 28, and *United States* v. *Candelaria*, 271 U. S. 432, are cited. These cases merely hold that Pueblo Indians, on lands granted by Spain and confirmed by the United States, are wards and are subject to the Indian intercourse laws. *United States* v. *Kagama*, 118 U. S. 375, is also cited. It involved a crime committed on a duly established California Indian reservation.

proved; counsel say, "If aboriginal possession is thus protected"; also, that this Court in 1927 rejected "the argument that Spanish and Mexican law recognized no Indian rights based on occupancy" (Brief, 79).

In these two cases, neither Papago claim nor decision of this Court was based on the theory that Indian occupancy as a fact creates right as a matter of law.

Lane v. *Pueblo of Santa Rosa*, 249 U. S. 110, involved claim that a formal grant of lands had been made by the Spanish sovereign to a Pueblo, incorporated under Spanish laws, and made a corporation, capable of suing to defend its rights, by act of Congress. The Supreme Court took the allegations to be true, and the case was reversed to give the alleged Pueblo a chance to prove its case, leaving all allegations of fact open to challenge.

In *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, the trial court had dismissed the case because counsel had no authority to bring it. The Court of Appeals of the District of Columbia affirmed the case, not because counsel had no authority to act, but on the merits. The Supreme Court held that in taking this action the Court of Appeals erred, because there was no authority in fact vested in counsel by the Indians, and, secondly, because even had there been such authority in fact vested, the law required such authorizations as were before the court to be approved by the Department of the Interior.[21]

21. The argument that because the Court applied Sections 2103 and 2116, now Title 25, Sections 81 and 177, U. S. C. A., it necessarily held that the Papagos were entitled to what they claimed (or, more accurately, what they did not claim, Brief, 35, 78-9) is unsound for many reasons. The Court said it was not deciding the merits; the argument insists the Court decided them. The Hunter contracts would have required departmental approval, under the statutes, before the Papago could have authorized him to prosecute claim, even though the result might be judgment of their invalidity. It is also worthy of note that the Department has shifted the Papago about at its own pleasure, and that its latest demarcation of their boundaries is held by the Solicitor to be the "measure of their legal right." 54 I. D. 359, at 370. The statutes in question read, in so far as pertinent:

> "*Contracts with Indian tribes or Indians.* No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any

These two decisions were determinative of nothing here at issue. We cannot better summarize their lack of effect than the Solicitor of the Department of the Interior summarized it in his opinion concerning the Papago Indians, 54 I. D. 359, at 361:

> "It is to be remarked that during all these years of Indian occupancy and of Federal action presupposing the inclusion of the land in question within the public domain, only one instance of formal assertion of Indian title is recorded. In that case the Supreme Court of the United States considered an Indian claim to a particular small area within the Papago country. The litigation was indecisive. *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110 (1919); *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315 (1927). Under these circumstances and at this late date, those who assert that the Indians hold fee simple title to this land must bear a substantial burden of persuasion."

Two Court of Claims cases correctly set forth the rule of law which should be applied. In *Hagt* v. *United States and the Utah Indians*, 38 Ct. Cls. 455, the Court said:

> "The extension of the trade and intercourse laws over the Indians in New Mexico and Utah did not have the effect to make those territories Indian country." (p. 460.)
>
> "It became Indian country when the United States set apart a reservation, and not until then, and to the extent of the reservations assigned to them only." (p. 464.)

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money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows: • • •" (Title 25, Sec. 81, U. S. C. A.)

"*Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." (Title 25, Sec. 177, U. S. C. A.)

> "We are constrained to hold that with the acquisition of territory from Mexico the treaty-making power intended to Americanize the ceded territory. * * * The only rational view to take of the matter is that that country became Indian country only where the Indians had the exclusive right to occupancy." (pp. 464-5.)

Even an appropriation for expenses of extinguishing Indian claims has been held not to be a political recognition creating rights, *Duwamish, et al., Indians* v. *United States*, 79 Ct. Cls. 530, 607 and—

> "In this connection it is apropos to state that the recognition by the Government of Indian title by occupancy is not established by proof of the innumerable contacts of the tribes with Indian agents in the administration of Indian affairs. The general policy of the Government, indexed in its gratuity appropriations, is not of itself a congressional action conferring upon the tribes a proprietary right in their occupied lands which may be asserted against the Government's alleged invasion, in the absence of a law granting the privilege." (*Ibid.*, 606-7.)

D. *There Are No Acts Performed by the Executive Department Which Vest Title to the Lands in Question in the Walapai.*

The section of Petitioner's brief (Brief, 47-59) which indicates by its heading that it will deal with executive interpretation of the 1866 act and executive acts with respect to lands of the Mexican cession which together "confirm the existence of possessory rights in lands aboriginally occupied" does not, in fact, touch any executive action dealing with the Act of 1866, and deals with no executive action which tends to confirm the existence of possessory rights in lands aboriginally occupied by the Walapai. The "kinds of administrative material" dealt with is classified by counsel as:

1. Foreign treaties. One is mentioned.

2. Indian treaties. None with the Walapai exists. Their rights have been otherwise measured.

3. Regulations of the executive departments. Not one is found. This circumstance is thought to demonstrate that the Walapai have been conceded rights outside their statutory reservation and their executive order reservation.

We will consider these classes of "administrative material" in order.

1. *Foreign treaties.* The treaty of Guadalupe Hidalgo only (Appendix, 3) is referred to, and particularly its eleventh section, admittedly applicable to the Walapai. The terms of this treaty are entirely at odds with the claim that is made for it. It guarantees no protection to any Indian tribe as claimed (Brief, 48), but guarantees protection to Mexico from the results of Walapai removal by the United States and the settling by American citizens on lands formerly occupied by Walapai. The "obligation to a sister republic" was and is a political one. If Congress had driven the Walapai to Mexico, its action would have been right, in so far as any judgment or any relief possible from this Court is concerned. Further, it is plain from the protocol, second paragraph (Appendix, 6), that the only titles the United States undertook to protect were *grants of land* in the ceded territories.

2. *Indian treaties* are next. It can not avail Petitioner that other Indians along the route statutorily designated for the Atlantic & Pacific had rights accorded by treaty. The cession by Mexico occurred at a time when the Indian policy of the United States was in a period of transition. As has been noted, inquiry by agents sent to California resulted in a report that the wild tribes had no rights under the laws of Spain and Mexico, and Congress thereafter, save for exceptional instances, made no treaties with Indians in the ceded territory. At this time, the practice of making treaties with Indians anywhere was coming to an end. It was formally prohibited for the future by the

Act of 1871; but already the new policy born of the relatively greater power of the United States had been made effectual, as, for instance, in the assignment of the Walapai to a statutory reservation and in the refusal to concede any possessory rights to Indians in California, who, under the new policy, were forced on to reservations created by treaty or Executive order. There were a few survivals of the old custom of making treaties. There had been several treaties with the Navajo, made by the military authorities during the wars against that tribe. Col. Donovan proceeded against them in 1846, and made a treaty of peace in that year. This treaty was soon broken, and in 1849, at the end of another expedition led by Col. Washington, another treaty was made and also broken. In 1863, Col. "Kit" Carson killed the Mohaves' live stock and took most of the Mohaves to Fort Sumner, New Mexico, holding them in captivity there until 1867, when they were taken back to their old hunting grounds. 2 Hodge, *Handbook of American Indians*, Smithsonian Institution, Bureau of American Ethnology, Bulletin 30, p. 41. In 1868, there was, as has been noted by Petitioner, another treaty, published in 15 Stat. 619, setting aside a reservation for them and taking from them an agreement that they relinquished all right to occupy territory outside their reservation.

The Eastern Apaches originally resided in territory that had been Texan. In the Eighteenth Report of the Bureau of American Ethnology, page 923, appears the following account of them:

> "The Apache alluded to here as Eastern bands comprised the bulk of the Jicarilla and Mescalero Apache. Their country lay to the eastward of the Rio Grande river, extending into Colorado and Texas, where it overlapped the Kiowa and Comanche claim. A few of them concluded a treaty Oct. 17, 1865, by which they agreed to confederate with the Cheyenne and Arapaho upon a reserve assigned the latter in Indian Territory. Subsequently, by treaty of Oct. 21, 1867, they were

confederated with the Kiowa and Comanche upon a reserve assigned the latter tribes in Indian Territory. Those so confederated relinquished their claim to ancestral territory, but they were few in number. No other treaty of purchase was made with these Apache, but those not confederated with the Kiowa and Comanche have been assigned reservations from time to time, all of which are shown on New Mexico map No. 2. The original domain of the Eastern Apache is here partially shown on New Mexico map No. 1, and is fully delineated on special Texas map."

The treaties made with the Ute Indians are sufficiently described in *Haut* v. *United States*, 38 Ct. Cls. 455, to which reference is made for complete analysis of these treaties and the Navajo treaty.

The remaining treaties cited by Petitioner are with respect to Indians in territories remote from the territory claimed by Walapai and with an entirely different history of legislative and treaty action.

Petitioner loses sight of the fact that the United States has dealt some times with a territory as a whole, some times with Indians in a large territory as a group, but more typically with specific Indians and their specific claims by specific treaties, statutes, or executive orders. The rights of a tribe to particular lands can not be measured by the rights of other tribes in other lands. The precise question is the particular claim of the Walapai to have particular lands described in the complaint, and this issue can not be solved by examining the title of other Indians as to other lands. The Walapai have been given their rights, but these only may they enjoy.

3. *Regulations of the executive departments* is the third and last category of "administrative materials" advanced. This material is the absence of any regulations; and we suggest that if the Walapai were possessed of any right other than to the lands given them by Congress and the

President's executive order, some affirmative indication of such right would appear. Because the regulations do not say that the Walapai were denied rights beyond what Congress and the President gave them, it is argued that they must have had such rights (Brief, 51-2). This result is reached on reasoning that there was a general protection of Indians outside of the Mexican cession, and if there had been any disposition to deny the Walapai the rights elsewhere accorded some indication would have appeared in the regulations. The fault of this argument lies in its assumed premise that Indians outside of the Mexican cession were given rights other than those derived by political action of Congress or the Executive or the treaty-making power. None such has been discoverable by us.

> "It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them as a place of domicile for the tribe, and they hold and occupy it with the consent of the United States, and under their authority." *United States* v. *Rogers*, 4 How. 567, 572; *Stephens* v. *Cherokee Nation*, 174 U. S. 475, 485.

Every case cited by Petitioner of Indian tribal rights that have been judicially protected in any part of the United States has been an instance of rights held by virtue of a statute, treaty, or Executive order; and it would be a curious result if, because Indians other than Walapai have been given rights by Congress, or the Executive, or the treaty-making power, Walapai who enjoy rights flowing from Executive order and from statute should enjoy not only the results thus received, but other rights not based on any concession from the sole sources of legal right.

Counsel for the Indians assert that a prior valid title of the Indians has been found to have existed in a number of cases, notwithstanding action by the Congress and the Executive purporting to dispose of their lands. A number of cases are cited, but in none of them, after disposals of

Indian lands by Congress or the Executive, was the Indian title to the lands held to be still existent.[22]

In each of the cases cited the disposal by Congress or the Executive was not disturbed. The complete assumption of all except two was that the United States had taken and disposed of the lands in the exercise of its undisputed power to do so, and following such action the Indian title was destroyed and the Indians had left only a claim against the United States for damages. In each of the cases cited, damages against the United States were awarded.

In two of the cases the Court expressly decided the question of whether there had been an effective taking and disposition by the United States. In *United States v. Creek Nation*, 295 U. S. 103, officers of the United States, without lawful authority, had mistakenly included certain lands, held in fee simple title by the Creeks under a treaty and a patent, in lands utilized for other Indians and allotted to them in part and in part sold to white settlers. Congress, knowing of this disposition, allowed it to stand, and the Court held that in view of this inaction of Congress the disposals were ratified and effectual.

In the *Shoshone* case [illegible] its first appearance in the Supreme Court, 299 U. [illegible], Mr. Justice Cardozo held that in view of an early [illegible]ng by administrative officers of Shoshone property granted by treaty, and its devotion to use by another tribe, an original unlawful taking was converted into a taking by the sovereign in its undoubted power to take and dispose of the Indian title.

In each of the cases cited, except in one phase only of

22. Cited are: *New York Indians v. United States*, 170 U. S. 1; *Blackfeet, et al. v. United States*, 81 Ct. Cls. 101; *Fort Berthold Indians v. United States*, 71 Ct. Cls. 308; *Shoshone Indians v. United States*, 82 Ct. Cls. 23, the same case on appeal, 304 U. S. 111, and the same case in its earlier decision, 299 U. S. 476; *Assiniboine Indian Tribe v. United States*, 77 Ct. Cls. 347; *United States v. Klamath Indians*, 304 U. S. 119; *United States v. Mille Lac Chippewas*, 229 U. S. 498; and *United States v. Creek Nation*, 295 U. S. 103 (Petitioner's Brief, 56-8, footnotes 38 to 42, inclusive).

the *Assiniboine* case, 77 Ct. Cls. 347, the Indian rights at issue had been originally rights to land guaranteed by treaties negotiated pursuant to the treaty-making power, ratified by the Senate, and proclaimed by the President. In each there was an enabling act which defined the jurisdiction of the Court and, except in one phase of the *Assiniboine* case, confined the jurisdiction of the Court to a jurisdiction to ascertain and determine whether treaty or statutory rights of Indians had been violated and to fix damages for any violation ascertained to have occurred.

In the *Assiniboine* case, the Court of Claims was permitted to award damages against the United States for the taking of lands which the Assiniboines might prove they had occupied immemorially. They were unable to prove immemorial, exclusive occupancy of the area in question.

In net result, these cases demonstrate that with respect to Indian rights guaranteed by treaty, disposals made by Congress, by the Executive with the express authority or ratification of Congress, or by any other means by which the sovereign United States may lawfully act, are valid disposals, and that a disposal having been determined to have been made, the Indians have, not rights to the lands once held by law or treaty, but instead a substitute claim for damages against the sovereign. These cases deal only with the measure of legal rights accorded to the Indians by express terms of treaty or law; and the result reached in each instance is an interpretation of the treaty or law according right to the Indians, and the law according and limiting jurisdiction of the court.

Why these decisions are inserted in a discussion of "administrative material" is a question as difficult to answer as the question of how Petitioner can not realize that those cases prevent the relief herein sought. By contrast with the Indian rights protected in those cases,

by award of damages against the United States for the taking of rights based upon treaties conveying to the Indians complete beneficial title, the Walapai claim asserted against the disposal of the United States, and based on no treaty and no statute, and asserted against the weight of ninety years of legislation and administration denying the claims they assert and creating in them rights not here in issue, stands in a most unfavorable light.

To the "three classes" of "administrative material" counsel for the Indians add two expressions of opinion, admittedly unimportant. In one of them the Indian Superintendent of the Territory of Utah expressed opinion that the United States accepted the cession subject to all just rights of the Indians. Obviously Judge Doty was speaking in language calculated to influence Congress in the formulation of laws but not proper for consideration by a court in determining the intent of laws actually enacted. The Commissioner of Indian Affairs in his report for 1872 did express the opinion (Brief, 53) that the Government had never recognized any distinction between Indians in the territory ceded by Mexico and Indians living elsewhere. This expression is true in the sense that Indians in all the territory of the United States acquired such rights as they possessed under the laws of the United States by Act of Congress, by treaty, or by Executive action. The exact measure of land right accorded to any Indian tribe anywhere has always been dependent upon the action by the power that creates rights under our constitutional system. That power, with respect to the Walapai, created rights in the 1865 reservation, the 1883 reservation, and nowhere else. The exact administration of the law with respect to the Walapai, the lands of Arizona, and the Atlantic & Pacific Railroad, was reported to Congress in 1872, as it had been theretofore and was repeatedly afterward, by the President, transmitting, as it was his

lawful duty, the reports of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Commissioner of the General Land Office. The President in his report for this year, in accounting to Congress how he and those under his direction had been executing and intended to execute further the laws of Congress, as required by the Constitution, stated, with respect to Indians in Arizona, that the Army was being employed to effectuate the policy of the sovereign to force them to give up their hunting grounds, submit to the white development that Congress had decreed, and to restrict them to the reservations provided. Arizona was to be, under the policy of Congress and its application by Executive officers charged with making that policy effectual, devoted to white development, and to this end the Indians were to be confined to reservations provided. The military was to force them to submit to the will of Congress; the railroad was to be built and used both as an aid to white development and as a means of destroying the Indian possession which had theretofore stood as an obstacle to white development. We reproduce the pertinent excerpts from this report of the President to Congress in 1872, at pages 112 to 116 of the Appendix.

This was no mere expression of opinion by administrative officials. There was nothing scattered or doubtful about this communication to Congress of the President's interpretation of its policy. There is nothing doubtful about President Grant's instruction to General Schofield that Indians on their reservations would be protected but those who would not submit to the rules and regulations laid down for them would be forced to comply with the will of Congress.

Year after year, this same nature of report was made. These were not scattered or doubtful. They were the public records, publicly required by law to be made, of the

interpretation and execution of the laws of the United States by those charged with their execution. Upon the strength of these reports, Congress appropriated moneys and enacted legislation in entire harmony with and furtherance of its policies, the execution of which they reported.

No considered opinion, counsel for the Walapai say, has ever been rendered as to the relative rights of the Walapai tribe and the railroad. In 1919, the relative rights within the Walapai Reservation of the Indians and the railroad were at issue. The Secretary of the Interior received from the Commissioner of Indian Affairs the arguments that have been made in this case, and determined that the railroad's right was perfect. He so reported to Congress, and Congress enacted legislation on the strength of his findings. Patents are alleged to have issued to all second cause lands, and it is conclusively presumed that the Secretary of the Interior, with power and under the necessary duty of determining what was and what was not granted, determined that the railroad had full right and title. No other inference is possible after the President has attested by patents final evidence of full and complete title, that the United States has conveyed, as provided by the act, the "right and title" (Sec. 4, Appendix, 33) "to have and to hold" (R. 24).

Not only is the institution of this suit not an evidence of any Departmental determination against the rights of Respondent, as intimated by counsel for the Walapai (Brief, 56), but it is distinctly doubtful that an action so apparently contrary to the policy and law of the United States can lawfully be brought.

X.

There Is No Need to Reverse the Case for the Taking of Testimony.

In Point 3 (Brief, 92-104), counsel for the Indians are confused as to what the courts below decided and the grounds for their decision. If the grounds of those decisions are correct, there is no need to question factual occupancy, tribal organization, or voluntary cession. What must be overcome by Petitioner is the holding of the courts below that regardless of tribal organization, tribal occupancy, extent of claim, and voluntary cession or lack of it, the laws of the United States, enacted in the exercise of plenary political power, and the administration thereof under lawful authority, have denied the Walapai the rights they claim and confirmed Respondent in the right and title which they challenge. Such is the effect of the public history of the United States taken from sources which, as expressions of law and public history, cannot and are not sought to be controverted.

It did not matter in *Barker* v. *Harvey*, 181 U. S. 481, that the Indians had physically occupied the lands they claimed. Evidence of factual possession of and tribal relation to the land was taken in that case, and held properly stricken because any right held under the laws of a prior sovereign had been lost by failure to present it to the Court provided within the time allowed, and because the legislation and administration of the United States had not itself created any such right as claimed. In *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472, evidence was, as in this case, refused, because the result was determined by controlling considerations such as are present in this case, and which did not take into account possession in fact, which has no right-creating power. We respectfully submit that a protracted trial would be only

on factors which could not alter the result necessarily dictated by acts of Congress, and administration.

It mattered not in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, and *Conley* v. *Ballinger*, 216 U. S. 84, that the Indian rights involved were held under solemn treaty. Even the legal relationship of the Indians to the land does not affect a disposal thereof made by Congress in the exercise of its absolute power. It made no difference, in *United States* v. *Creek Nation*, 295 U. S. 103, and *Shoshone Tribe* v. *United States*, 299 U. S. 476, that the taking by the United States and the disposal by it was a destruction of treaty rights. In the *Lone Wolf* and *Conley* cases, and in *Super* v. *Work*, 3 F. (2d) 90, affirmed by this Court, 271 U. S. 643, dispositions were sought to be enjoined, and in each case injunction was refused. In *Super* v. *Work*, 3 F. (2d) 90, 91, the Circuit Court of Appeals said:

> "(2-4) The rights of the Indians in the present case differ from those in the cases above cited only to the extent that in those cases they were Mission Indians, while in the present case, at and prior to the cession by Mexico, the plaintiff Indians were merely roving bands. Congress at all times exercises plenary authority over the tribal relations of Indians. The power thus exercised is in its nature political, and not judicial. It has accordingly been held not to be subject to the control of the judicial department of the Government. The power of Congress is so absolute that it may abrogate even the provisions of an Indian treaty, which authority arises from its paramount power over the property of Indians by reason of its exercise of guardianship. Congress may in the exercise of this power determine the rights of Indians to the occupancy of lands, and, if injury occurs, the relief must be sought from Congress, and not from the courts. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565, 23 S. Ct. 216, 47 L. Ed. 299."

In affirming, this Court said (271 U. S. 643):

> "Affirmed upon the authority of (1) *Barker* v. *Harvey*, 181 U. S. 481; *United States* v. *Title Insurance*

Company, 265 U. S. 472; (2) *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Conley* v. *Ballinger*, 216 U. S. 84, 90."

As indicated in the history we have elaborately reviewed, this action is in reality against a disposal by Congress of that which was within its plenary power to dispose. We respectfully submit that the dispositions refused to be enjoined in the *Conley, Lone Wolf,* and *Super* v. *Work* cases were final, and that after title had vested in grantees of the United States, the Indians could not have attacked the conveyances or reasserted a right by those conveyances denied them, as was held in *Barker* v. *Harvey, United States* v. *Title Ins. & Trust Co., United States* v. *Creek Nation*, and *Shoshone Tribe* v. *United States*.

We have said that counsel for the Indians have mistaken the issue here and the holdings of the courts below. The courts below held that all questions of fact were immaterial in view of the plain intent of Congress and the indisputable effect of administration. The Circuit Court of Appeals did not, any more than did Respondent, admit, as claimed (Brief, 93-4, 104), that possession in fact ever gave any Indians legal rights. The court below correctly held that Indian titles in Arizona were those derived by confirmation or concession by the United States; and there is no suggestion that an actual possession in fact had the power to create a right in any group of Indians who had no concession of legal right from the sovereign.

Counsel for the Walapai charge that the Circuit Court of Appeals either directly or implicitly proceeded upon factual assumptions, or made findings of fact with respect to questions of occupancy and tribal organization (Brief, 93, 94-5), and charge that the trial court accepted Respondent's contention that the Walapai had abandoned their claims (Brief, 99). These claims of counsel apparently flow from a misunderstanding of the action of the courts below, which were both predicated upon the unmistakable will of Congress operating on a subject matter over which

it had complete power, and the concrete application of the sovereign intent to the lands, the Indians, and the railroad. To this theory, and to this action, all questions of occupation in fact, Indian organization, and Indian intent were immaterial, and were expressly so held.

There are several details which we do not wish to pass without challenge, though not material in our conception of the case. Counsel say the Walapai were recognized as a tribe by the United States. To the Act of 1865 they were "Indians" of the Colorado River (Appendix, 26). To the Executive order of 1883 they were "Hualpai Indians" (W. F., 146). The Act of 1925 makes no reference to them as a tribe (Appendix, 68). Such references as we have located in the appropriation statutes [23] refer to them simply as Walapai Indians. No treaty was ever made with them conceding their political power and giving rights as a tribe. There may be some late recognition by the Interior Department of which we are unaware; but whatever the fact in this connection, there has been no recognition of the Walapai as possessed of the land rights they claim in this proceeding.

The discussion of the creation of the 1865 reservation we challenge in many particulars. The Act of 1865 was considered below as an unequivocal act of Congress assigning these Indians, who had no rights elsewhere, to a reservation, an act which would have been in itself sufficient to deny the present claim. Whether the act was passed with or without Indian consent, Indian consent was given, though unnecessary.

The impeachment of the character of Poston (Brief, 99) is uncalled for. The letter referred to on page 97, footnote 85, is reproduced for the Court in the Appendix, page 117. His horror at the murders and depredations of the treaty-

23. "To enable the Secretary of the Interior to purchase * * * for the support of the Hualpais Indians in Arizona * * * dollars." 23 Stat. 94, and 377-8; in similar wording, 24 Stat. 41 and 461; 25 Stat. 230 and 995, 26 Stat. 351 and 1004; 27 Stat. 134 and 627; 28 Stat. 302 and 891; 29 Stat. 337; 30 Stat. 77, 585, and 937; 31 Stat. 234; 32 Stat. 257, 993.

breaking Apaches (1 Hodge, *Handbook of American Indians*, Smithsonian Institution, Bureau of American Ethnology, Bulletin 30, House Document No. 926, Part 1, 59th Cong., 1st Sess., page 63) was the typical reaction of the times, his letter a truthful portrayal of the policy of Congress in other particulars up to the present time. Nothing could be more absurd than the idea that Poston was trying to get elected by false promises to the Indians, who could not vote. The Commissioner of Indian Affairs reported to Congress what Poston and the Indians had agreed to, with some graceful literary flourishes (W. P., 33, R. 69), but did not "recommend" any proposal to the Indians, as alleged by Petitioner (Brief, 99).

All included in Petitioner's Point 3 is entirely beside the point. The courts below found that the Walapai, regardless of any organization or occupancy issue sought to be raised, had been denied the rights claimed, and that Respondent had been confirmed in its title. These findings were based upon a history of law and administration that was not controverted below and can not be controverted here. While the case does not turn on the fact issues in question, we have reproduced in the Appendix, pages 90 to 111 the material called to the attention of the courts below.

XI.

Conclusion.

This case is respectfully submitted. It presents an issue both complex and yet in its final analysis quite simple. Complex, not in the sense of complicated or intricate, but complex only in that a great number of official dealings over a long interval are all to be considered; simple, because all of this complex fits into a single easily understood pattern. The issue is to be considered as one involving three parts:

(1) what did Congress do;

(2) what was the intention of Congress in doing what it did; and

(3) what was its power?

As to (1) and (3) we do not understand that counsel differ among themselves in any material respect. That Congress had power we think is fully conceded. This leaves the question of *intention* as the gist of the case. That question we submit is to be settled by the acts of Congress—the Granting Act and those *in para materia*. If there be ambiguity in any of these from which the intention of Congress can not certainly be derived then the Court will apply the familiar rules of construction and interpretation.

From all this complex but one answer can be found, affirming the conclusion of the two lower courts to the effect that the beneficial ownership as well as the legal title were, and were intended to be, conferred upon Respondent's predecessor, the Atlantic & Pacific.

No amount or character of evidence of occupancy based upon "aboriginal possession" can possibly change the result.

CHARLES H. WOODS,
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RICHARD M. FENNEMORE,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 23

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA,

Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY,
A CORPORATION,

Respondent.

APPENDIX.

RESPONDENT'S PRESENTATION OF TREATY AND LAWS PRINCIPALLY AT ISSUE AND OTHER MATTERS OF PUBLIC RECORD.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 23.

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI* IN THE STATE OF ARIZONA,

Petitioner.

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

APPENDIX.

RESPONDENT'S PRESENTATION OF TREATY AND LAWS PRINCIPALLY AT ISSUE AND OTHER MATTERS OF PUBLIC RECORD.

PART I.

Constitutional and Legislative Bases for Administration of Indian Affairs and the Public Domain.

CONSTITUTION.

Article IV, Section 3, clause 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

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* Herein spelled "Walapai".

Article I, Section 8: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *."

Article II, Section 3: The President "shall take Care that the Laws be faithfully executed, * * *."

STATUTES.

Title 5, Section 485, U. S. C. A.: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

"*First.* The public lands, including mines.
"*Second.* The Indians.
"*Third.* Bounty-lands.
"*Fourth.* Education.
"*Fifth.* St. Elizabeths Hospital.
"*Sixth.* Columbia Institution for the Deaf.
"*Seventh.* The Bureau of Mines."

Title 43, Section 2, U. S. C. A.: "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

Section 2, Title 25, U. S. C. A.: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." (Act of July 9, 1832, 4 Stat. 564; Act of March 3, 1849, Section 5, 9 Stat. 395; Act of July 27, 1868, 15 Stat. 228.)

PART II.

Treaty and Statutes.

EXCERPTS FROM TREATY OF GUADALUPE HILDALGO, 9 Stat. 922:

"ART. VIII. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

"Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

"In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

"ART. IX. The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according

to the principles of the Constitution; and in the meantime, shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

* * *

"ART. XI. Considering that a great part of the territories, which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the Government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the Government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said Government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were mediated or committed within its own territory, against its own citizens.

"It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabitating the territory of either of the two Republics; nor to purchase or acquire horses, mules, cattle, or property of any kind, stolen within Mexican territory by such Indians.

"And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the Government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them and return them to their country, or deliver them to the agent or representative of the Mexican Government. The Mexican authorities will, as far as practicable, give to the Government of the United States notice of such captures; and its agents shall pay the expenses incurred in the maintenance and

transmission of the rescued captives; who, in the meantime, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the Government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

"For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the Government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but, on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

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PROTOCOL.

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"1st. The American Government by suppressing the IXth article of the treaty of Guadalupe Hidalgo and substituting the IIId article of the treaty of Louisiana, did not intend to diminish in any way what was agreed upon by the aforesaid article IXth in favor of the inhabitants of the territories ceded by Mexico. Its understanding is that all of that agreement is contained in the 3d article of the treaty of Louisiana. In consequence all of the privileges and guarantees, civil, political, and religious, which would have been possessed by the inhabitants of the ceded territories, if the IXth article of the treaty had been retained, will

be enjoyed by them, without any difference, under the article which has been substituted.

"2d. The American Government by suppressing the Xth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

"Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2d March, 1836."

ORIGINAL DRAFT OF TREATY.

(S. Ex. Doc. 52, 30th Cong., 1st Sess., Proceedings on the Treaty of Guadalupe Hidalgo.)

Article X read as follows:

"All grants of land made by the Mexican government, or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico. But the grantees of lands in Texas, put in possession thereof, who, by reason of the circumstances of the country, since the beginning of the troubles between Texas and the Mexican government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfil the said conditions within the periods limited in the same, respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty; in default of which, the said grants shall not be obligatory upon the State of Texas, in virtue of the stipulations contained in this article.

"The foregoing stipulation in regard to grantees of land in Texas is extended to all grantees of land in the territories aforesaid, elsewhere than in Texas, put in possession under such grants; and, in default of the fulfilment of the conditions of any such grant, within the new period, which, as is above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void.

"The Mexican government declares that no grant whatever of lands in Texas has been made since the second day of March, one thousand eight hundred and thirty-six; and that no grant whatever of lands, in any of the territories aforesaid, has been made since the thirteenth day of May, one thousand eight hundred and forty-six." (Ibid. 49.)

The Senate of the United States deleted from the end of the second paragraph of Article XI the words "nor to provide such Indians with fire-arms or ammunition, by sale or otherwise." (Ibid., 50.)

Concerning stipulations of Article XI, Trist wrote to Buchanan (Ibid., 293) on January 25, 1848:

"The stipulations respecting the Indians inhabiting the transferred territory, independently of their justice, were indispensable to make the treat· acceptable to the northern States, or to any who take the proper interest in their security; in a word, to any one who has the feelings of a Mexican citizen, or at least respect for the obligations which a federal union imposes. Excepting only the specific prohibition against supplying the Indians with fire-arms and ammunition, (if, indeed, this can justly be deemed an exception), those stipulations contain nothing which is not expressed or plainly implied in the treaty of amity, commerce, and navigation, (article 31), which is revived in the present treaty of peace. But to make the article what it must be, to satisfy the public mind of this country, it was necessary that those implied obligations should be set forth in detail, and expressed in the most unequivocal manner. Upon examining the old treaty, I found that it imposes absolutely, and without any saving or qualification whatever as to the practicability of the

thing, the obligation 'to *restrain*,' by force, '*all* hostilities and incursions,' and 'not to *suffer* their Indians to attack;' and also, in regard to captives made by Indians, 'to return them to their country as soon as they know of their being within their respective territories.' I found, also, that the last sentence is so worded as to restrict the prohibition against the purchase of captives, in a manner which could not possible have been intended. In the new treaty the obligations above referred to are expressed with the qualifications demanded by the nature of the subject, in order that they may have the character of a practical law, agreed upon and established upon serious consideration of its requirements, and in the *bona fide* intention that these shall be fulfilled: an intention which stands exposed to serious doubt, when engagements entered into 'in the most solemn manner' are found expressed in a manner so loose, that their exact fulfilment, as expressed, involves impossibilities."

Kearney's Law of 1847 (officially published with New Mexican Laws of 1852):

"*An Act to Enable Pueblo Indians to Bring and Defend Actions:* 'The inhabitants within the territory of New Mexico known by the name of Pueblo Indians, and living in towns or villages built on lands granted to such Indians by the laws of Spain and Mexico, and conceding to such inhabitants certain lands and privileges, to be used for the common benefit are severally hereby created and constituted bodies politic and corporate and shall be known in the law by the name of the Pueblo de ..... (naming it) and by that name they and their successors shall have perpetual succession, sue and be sued, plead and be impleaded, bring and defend in any court of law or equity all such actions, pleas, and matters whatsoever, proper to recover, protest, reclaim, demand or assert the right of such inhabitants, or any individual thereof, to any lands, tenements or hereditaments, possessed, occupied or claimed contrary to law, by any person whatsoever, and to bring and defend all such actions and to

resist any encroachment, claim or trespass made upon such lands, tenements or hereditaments, belonging to such inhabitants, or to any individual.' (December, 1847.)"

New Mexican Statute passed and approved July 14, 1852 (New Mexican Statutes of 1852):

"That all laws that have previously been in force in this Territory that are not repugnant to or inconsistent with the Constitution of the United States, the organic law of the Territory, or any act passed at the present session of the Legislative Assembly, shall be and continue in force, except in Kearney's Code the law concerning Registers of Land."

Excerpts from Act of September 9, 1850, "Chap. XLIX.—*An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a territorial Government for New Mexico,*" 9 Stat. 446:

"SEC. 2. *And be it further enacted,* That all that portion of the Territory of the United States bounded as follows * * * be, and the same is hereby, erected into a temporary government, by the name of the Territory of New Mexico: *Provided,* That nothing in this act contained shall be construed to inhibit the government of the United States from dividing said Territory into two or more Territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion thereof to any other Territory or State: *And provided, further,* That, when admitted as a State, the said Territory, or any portion of the same, shall be received into the Union, with or without slavery, as their constitution may prescribe at the time of their admission."

Section 3 deals with the executive power.

Section 4 deals with the Secretary.

Section 5 delegates legislative power and provides for legislative assemblies.

"SEC. 6. *And be it further enacted*, That every free white male inhabitant, above the age of twenty-one years, who shall have been a resident of said Territory at the time of the passage of this act, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory; but the qualifications of voters and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly: *Provided*, that the right of suffrage, and of holding office, shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico, concluded February second, eighteen hundred and forty-eight.

"SEC. 7. *And be it further enacted*, That the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislatve assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect."

Section 8 deals with appointment of officers.

Section 9 deals with the powers of officers to hold more than one post.

Section 10 establishes the judicial power and the judiciary.

Section 11 provides for a territorial attorney and marshal.

Section 12 deals with appointment of officers and their salaries.

Section 13 deals with legislative assembly's meetings and the seat of government.

"SEC. 14. *And be it further enacted*, That a delegate to the House of Representatives of the United States, to serve during each Congress of the United States, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several other Territories of the United States to the said House of Representatives. The first election shall be held at such time and places, and be conducted in such manner, as the governor shall appoint and direct; and at all subsequent elections, the times, places, and manner of holding the elections shall be prescribed by law. The person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly: *Provided*, That such delegate shall receive no higher sum for mileage than is allowed by law to the delegate from Oregon.

"SEC. 15. *And be it further enacted*, That when the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same."

Section 16 is a definition of judicial districts.

"SEC. 17. *And be it further enacted*, That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States.

"SEC. 18. *And be it further enacted*, That the provisions of this act be, and they are hereby, suspended until the boundary between the United States and the State of Texas shall be adjusted; and when such adjustment shall have been effected, the President of the

United States shall issue his proclamation, declaring this act to be in full force and operation, and shall proceed to appoint the officers herein provided to be appointed in and for said Territory.

"SEC. 19. *And be it further enacted*, That no citizen of the United States shall be deprived of his life, liberty, or property, in said Territory, except by the judgment of his peers and the laws of the land."

Act of March 3, 1851 (9 Stat. 631):

"CHAP. XLI.—*An Act to ascertain and settle the private Land Claims in the State of California.*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

"SEC. 2. *And be it further enacted*, That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

"SEC. 3. *And be it further enacted*, That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

"SEC. 4. *And be it further enacted*, That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interest of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his continuance, and to allow

him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

"SEC. 5. *And be it further enacted*, That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

"SEC. 6. *And be it further enacted*, That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

"SEC. 7. *And be it further enacted*, That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpœna commanding the attendance of a witness or witnesses before the said board or any commissioner.

"SEC. 8. *And be it further enacted*, That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commisisoners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

"SEC. 9. *And be it further enacted*, That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the district Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom

such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

"SEC. 10. *And be it further enacted*, That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

"SEC. 11. *And be it further enacted*, That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

"SEC. 12. *And be it further enacted*, That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal

or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

"SEC. 13. *And be it further enacted*, That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act 'to create the office of surveyor of the public lands for the State of Louisiana,' approved third March, one thousand eight hundred and thirty-one; *provided, always*, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further*, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose in-

stance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

"SEC. 14. *And be it further enacted*, That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village, shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

"SEC. 15. *And be it further enacted*, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

"SEC. 16. *And be it further enacted*, That it shall be the duty of the commissioners herein provided for

to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

"SEC. 17. *And be it further enacted*, That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

"SEC. 18. *And be it further enacted*, That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

"Approved, March 3, 1851."

Act of March 3, 1853, "An Act to extend Preemption Rights to certain Lands therein mentioned," 10 Stat. 244:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the preemption laws of the United States, as they now exist, be and they are hereby extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of Congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same in soldiers' bounty land warrants, estimated at a dollar and twenty-five cents per acre, or in gold and silver, or both together,

in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided*, That no person shall be entitled to the benefit of this act who has not settled and improved, or shall not settle and improve, such lands prior to the final allotment of the alternate sections to such railroads by the General Land Office: *And provided further*, That the price to be paid shall in all cases be two dollars and fifty cents per acre, or such other minimum price as is now fixed by law, or may be fixed upon lands hereafter granted; and no one person shall have the right of preemption to more than one hundred and sixty acres: *And provided further*, That any settler who has settled or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish, or other grants which have been or shall be hereafter declared by the Supreme Court of the United States to be invalid, shall be entitled to all the rights of preemption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant preemption rights,' after the lands shall have been released from reservation, in the same manner as if no reservation existed."

Act of July 22, 1854 (10 Stat. 308), "*An Act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska, to grant Donations to actual Settlers therein, and for other purposes*":

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President, by and with the advice and consent of the Senate, shall be, and he is hereby, authorized to appoint a Surveyor-General for New Mexico, whose annual salary shall be three thousand dollars, and whose power, authority, and duties shall be the same as those provided by law for the Surveyor-General of Oregon; he shall have proper allowances for clerk hire, office rent, and fuel, not exceeding what now is or hereafter may be allowed by law to the said Surveyor-General of Oregon; and he shall locate his

office from time to time at such places as may be directed by the President of the United States.

"SEC. 2. *And be it further enacted*, That, to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who was residing in said Territory prior to the first day of January, eighteen hundred and fifty-three, and who may be still residing there, there shall be, and hereby is, donated one quarter section, or one hundred and sixty acres of land. And to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who shall have removed or shall remove to and settle in said Territory between the first day of January, eighteen hundred and fifty-three, and the first day of January, eighteen hundred and fifty-eight, there shall in like manner be donated one quarter-section, or one hundred and sixty acres, on condition of actual settlement and cultivation for not less than four years: *Provided, however*, That each of said donations shall include actual settlement and improvement of the donee, and shall be selected by legal subdivisions, within three months after the survey of the land where the settlement was made before the survey; and where the settlement was made after the survey, then within three months after the settlement has been made; and all persons failing to designate the boundaries of their claims within that time, shall forfeit all right to the same.

"SEC. 3. *And be it further enacted*, That, on proof of the settlement and cultivation required by this act, to the satisfaction of the surveyor-general, or other officer designated by law for that purpose, subject to the supervision of the Secretary of the Interior, a certificate shall be issued to the party entitled, on presentation of which, if approved by the Secretary of the Interior, a patent shall issue thereon: *Provided, however*, That on the death of any such settler before the completion of the four years' occupancy and cultivation required by this act, the right shall descend to

his heirs at law, who shall be entitled to a certificate and patent, as aforesaid, on proof, as before provided, of continued occupancy and cultivation by such settler to the time of his death: *Provided, however*, That when lands are claimed under any of the provisions of this act by persons who are not citizens of the United States, patents shall not issue therefor until they become citizens.

"SEC. 4. *And be it further enacted*, That none of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, or lands settled on and occupied for purposes of trade and commerce, and not for agriculture, and all legal subdivisions settled on and occupied, in whole or in part, for purposes of trade and commerce, and not for agriculture, shall be subject to the provisions of the act of twenty-third of May, eighteen hundred and forty-four, in relation to town sites on the public lands, whether so settled and occupied before or after the survey of said lands, except that said lands shall be donated instead of being sold.

"SEC. 5. *And be it further enacted*, That when the lands in the said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township, in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same.

"SEC. 6. *And be it further enacted*, That, when the lands in said Territory shall be surveyed as aforesaid, a quantity of land equal to two townships shall be, and the same is hereby, reserved for the establishment of a University in said Territory, and in the State hereafter to be created out of the same, to be selected, under the direction of the legislature, in legal subdivisions of not less than one half-section.

"SEC. 7. *And be it further enacted*, That any of the lands not taken under the provisions of this act shall be subject to the operation of the Preemption Act of

fourth September, eighteen hundred and forty-one, whether settled upon before or after the survey; and, in all cases where the settlement was made before the survey, the settler shall file his declaration within three months after the survey is made and returned; and any person claiming a donation under this act shall be permitted to enter the land claimed by him at any time prior to the four years' occupancy and cultivation required, by paying therefor at the rate of one dollar and twenty-five cents per acre, and proving occupancy and cultivation up to the time of such payment.

"SEC. 8. *And be it further enacted*, That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal

by the government, and shall not be subject to the donations granted by the previous provisions of this act.

"SEC. 9. *And be it further enacted*, That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act.

"SEC. 10. *And be it further enacted*, That the President of the United States shall be and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, a Surveyor-General for the Territories of Nebraska and Kansas, who shall locate his office at such place as the President of the United States shall from time to time direct, and whose duties, powers, obligations and responsibilities and compensation shall be the same as those of the Surveyor-General of Wisconsin and Iowa, and who shall be allowed the same amount for office rent, fuel, incidental expenses, and clerk hire, as is allowed to said Surveyor-General of Wisconsin and Iowa.

"SEC. 11. *And be it further enacted*, That said Surveyor-General shall cause the necessary surveys to be made in said Territories of standard meridian, base, and parallel lines, and of township and subdivisional lines, under such rules and regulations as shall be prescribed by the Commissioner of the General Land-Office.

"SEC. 12. *And be it further enacted*, That all the lands to which the Indian title has been or shall be extinguished within said Territories of Nebraska and Kansas, shall be subject to the operations of the Preemption Act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned; *Provided, however*, That where unsurveyed lands are claimed by preemption, notice of the specific tracts claimed shall be filed within three months after the survey has been made in the field, and on failure to file such notice or to pay for the tracts claimed before the day fixed for the public sale of the lands by the proclamation of the President of the United States, the parties claiming

such lands shall forfeit all right thereto: *Provided* said notices may be filed with the Surveyor-General, and to be noted by him on the township plats, until other arrangements shall have been made by law for that purpose.

"SEC. 13. *And be it further enacted*, That the public lands in the Territory of Nebraska, to which the Indian title shall have been extinguished, shall constitute a new land district to be called the Omaha District; and the public lands in the Territory of Kansas, to which the Indian title shall have been extinguished, shall constitute a new land district, to be called the Pawnee District: the officers for each of which districts shall be established at such points as the President may deem expedient; and he is hereby authorized to appoint, by and with the advice and consent of the Senate, a Register and Receiver of Public Moneys for each of said districts, who shall each be required to reside at the site of their respective offices, and they shall have the same powers, perform the same duties, and be entitled to the same compensation as are or may be prescribed by law in relation to other land-offices of the United States. And the President is hereby authorized to cause the surveyed lands to be exposed for sale from time to time, in the same manner and upon the same terms and conditions as the other public lands of the United States."

Act of February 24, 1863 (12 Stat. 664), "*An Act to provide a temporary Government for the Territory of Arizona, and for other Purposes*":

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all that part of the present Territory of New Mexico situate west of a line running due south from the point where the southwest corner of the Territory of Colorado joints the northern boundary of the Territory of New Mexico to the southern boundary line of said Territory of New Mexico be, and the same is hereby, erected into a temporary government by the name of the Territory of Arizona: *Provided*, That nothing contained in the provisions of this act shall

be construed to prohibit the Congress of the United States from dividing said Territory or changing its boundaries in such manner and at such times as it may deem proper: *Provided, further*, That said government shall be maintained and continued until such time as the people residing in said Territory shall, with the consent of Congress, form a State government, republican in form, as prescribed in the Constitution of the United States, and apply for and obtain admission into the Union as a State, on an equal footing with the original States.

"SEC. 2. *And be it further enacted*, That the government hereby authorized shall consist of an executive, legislative, and judicial power. The executive power shall be vested in a governor. The legislative power shall consist of a council of nine members, and a house of representatives of eighteen. The judicial power shall be vested in a supreme court, to consist of three judges, and such inferior courts as the legislative council may by law prescribe; there shall also be a secretary, a marshal, a district attorney, and a surveyor-general for said Territory, who, together with the governor and judges of the supreme court, shall be appointed by the President, by and with the advice and consent of the Senate, and the term of office for each, the manner of their appointment, and the powers, duties, and the compensation of the governor, legislative assembly, judges of the supreme court, secretary, marshal, district attorney, and surveyor-general aforesaid, with their clerks, draughtsman, deputies, and sergeant-at-arms, shall be such as are conferred upon the same officers by the act organizing the Territorial government of New Mexico, which subordinate officers shall be appointed in the same manner, and not exceeded in number those created by said act; and acts amendatory thereto, together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act, are hereby extended to and continued in force in the said Territory of Arizona, until repealed or amended by future legislation: *Provided*, That no salary shall be due or paid the officers created by this act until they have entered

upon the duties of their respective offices within the said Territory.

"SEC. 3. *And be it further enacted*, That there shall neither be slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted; and all acts and parts of acts, either of Congress or of the Territory of New Mexico, establishing, regulating, or in any way recognizing the relation of master and slave in said Territory, are hereby repealed."

CHAP. XXIV. The Howell Code (Arizona, 1864):

"SEC. 6. Every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States under the treaty of peace exchanged and ratified at Quintero on the 30th day of May, 1848, and the Gadsden treaty of 1854, of the age of twenty-one years, who shall have been a resident of the Territory six months next preceding the election, and the county or precinct in which he claims his vote ten days, shall be entitled to vote at all elections which are now, or hereafter may be, authorized by law. * * *

"SEC. 55. At the general election to be holden on the first Wednesday of September, one thousand eight hundred and sixty-five, there shall be elected, under the provisions of this chapter, a delegate to the congress of the United States, for the term to commence on the fourth day of March next, and thereafter such delegate shall be elected at the general election held next previously to the commencement of his term of office, on the fourth day of March next after such election."

Excerpt from the Act of March 3, 1865 (13 Stat. 541, 559):

"All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries."

Act of July 27, 1866 (14 Stat. 292):

"Chap. CCLXXVIII.—An act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That John B. Brown, Anson P. Morrill, Samuel F. Hersey, William G. Crosby, Samuel E. Spring, Samuel P. Dinsmore, of Maine; N. S. Upham, Frederick Smyth, Onslow Stearns, S. G. Griffin, William E. Chandler, of New Hampshire; T. W. Parke, H. H. Baxter, John Gregory Smith, A. P. Lyman, of Vermont; Walter S. Burges, William S. Slater, Steven Harris, Thomas P. Shepard, of Rhode Island; William Merritt, Alexander H. Bullock, George L. Stearns, Genery Twitchell, Charles H. Warren, Chester W. Chapin, of Massachusetts; John Boyd, Robert C. Wetmore, John T. Wait, Cyrus Northup, of Connecticut; Solon Humphreys, J. Bigler, Homer Ramsdell, Isaac H. Knox, John A. C. Gray, Daniel L. Ross, A. V. Stout, M. K. Jessup, R. E. Fenton, E. L. Fancher, J. C. Fremont, James Hoy, Jesse M. Boles, Edward Gilbert, James P. Robinson, Oliver C. Billings, of New York; Charles Bachelor, John Edgar Thompson, Morton McMichael, T. Haskin Du Puy, Thomas A. Scott, Charles Rickettson, William Lyon, George W. Cass, Levi Parsons, of Pennsylvania; Charles Knap, J. L. N. Stratton, James B. Dayton, Robert F. Stockton, Alexander G. Cattell, A. W. Markley, of New Jersey; John W. Garrett, Charles J. M. Gwinn, Robert Fowler, Jacob Tome, Thomas M. Lanahan, of Maryland; Charles J. Dupont, Henry Ridgley, Andrew C. Gray, Nat. Smythers, of Delaware; Bellamy Storer, George B. Senter, William Baker, Samuel Galloway, David Tod, Charles Anderson, Bird B. Chapman, Edward Sturgis, Israel Dille, of Ohio; Edwin Peck, William D. Griswold, James P. Luse, Samuel E. Perkins, Conrad Baker, of Indiana; Richard J. Oglesby, N. B. Judd, Samuel A. Buckmaster, D. L. Phillips, L. P. Sanger, of Illinois; Eber B.

Ward, Omar D. Conger, Nathaniel W. Brooks, Alexander H. Morrison, of Michigan; Z. G. Simmons, Alexander Mitchel, J. J. Williams, G. A. Thompson, J. J. R. Pease, John H. Hersey, of Wisconsin; Henry A. Smith, Sherman Finch, William Mitchell, R. F. Crowell, L. F. Hubbard, E. F. Drake, of Minnesota; Lyman Cook, Platt Smith, Jacob Butler, Henry I. Reid, Hoyt Sherman, of Iowa; William G. Brownlow, of Tennessee; Thomas C. Fletcher, B. R. Bonner, John M. Richardson, Emil Pretorious, E. W. Fox, R. J. McElheny, Charles H. Howland, Madison Miller, George W. Fishback, T. J. Hubbard, George Knapp, Charles K. Dickson, A. G. Braun, G. L. Hewitt, P. A. Thompson, James W. Thomas, Charles E. Moss, Edward Walsh, A. R. Easton, Truman J. Horner, J. B. Eads, D. P. Garrison, W. A. Kayser, George P. Robinson, of Missouri; Thomas E. Bramlette, Benjamin Grats, C. E. Warren, Lazarus W. Powell, John Mason Brown, Joshua Speed, of Kentucky; Solon Thatcher, Jacob Stotter, William B. Edwards, James G. Blunt, Robert McBratney, of Kansas; Harrison Hagaus, James Cook, Robert Crangle, Benjamin H. Smith, of West Virginia; Lorenzo Sherwood, A. J. Hamilton, of Texas; William Gilpin, Henry C. Leach, of Colorado; Phinneas Banning, Timothy G. Phelps, William B. Carr, Edward F. Beale, Fred. F. Lowe, Benj. B. Redding, B. W. Hathaway, Leonidas Haskell, Frederick Billings, of California; W. S. Ladd, J. R. Moores, Walter Monteith, John Kelly, B. F. Dowell, of Oregon; James L. Johnson, Henry Connelly, Franciscus Perea, of New Mexico; J. H. Mills, A. P. K. Safford, E. S. Davis, of Nevada; King S. Woolsey, William H. Hardy, Coles Bashford, of Arizona; Henry D. Cooke, of the District of Columbia; and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style and title of the 'Atlantic and Pacific Railroad Company,' and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended,

in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, and construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River, thence to the town of Albuquerque, on the River Del Norte, and thence by way of the Agua Frio, or other suitable pass to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be *be* [*sic*] selected by said company for crossing; thence, by the most practicable and eligible route, to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian River eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas, at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act, as herein set forth. The capital stock of said company, shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the board of commissioners of the 'Atlantic and Pacific Railroad Company,' and fifteen shall constitute a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Turner Hall, in the city of Saint Louis, on the first day of October, anno Domini eighteen hundred and sixty-six, or at such time within three months thereafter as any ten commissioners herein named from Missouri shall appoint, notice of which shall be given by them to the

other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Cincinnati, Saint Louis, Memphis, and Nashville, once a week for at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof, as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said boards shall, in like manner, call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities or other places in the United States as they or a quorum of them shall determine, within twelve months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as ten thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least fifteen days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect, by ballot, thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and in case of their absence or inability any two of the officers of said board, shall act as inspectors of said election, and shall certify, under

their hands, the names of the directors elected at said meeting. And the said commissioners, treasurer, and secretary shall then deliver over to said directors all the moneys, properties, subscription books, and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen), and for the transaction of business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

"SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

"SEC 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops,

munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof may be selected as above provided: *And provided further*, That the word 'mineral,' when it

occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.'

"SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

"SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turn-outs, stations, and watering-places, and all other appurtenances, including furniture and rolling-stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be con-

structed a telegraph line, of the most substantial and approved description, to be operated along the entire line: *Provided*, That the said company shall not charge the Government higher rates than they do individuals for the like transportation and telegraphic service. And it shall be the duty of the Atlantic and Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it on fair and equitable terms.

"SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or preemption, before or after they are surveyed, except by said company, as provided in this act; but the provision of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the act amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

"SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company

shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises, and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by either party to any court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict more favorable, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintenance and operation of said road. And in case any of the lands to be taken as aforesaid shall be held by an infant, femme covert, non compos, insane person, or persons residing without the territory with-

in which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian, for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring a title to, the same; but the judge of the court hearing said suit shall determine the kinds of notice to be served on such owner or owners, and he may in his discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred

"SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the

second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

"SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

"SEC. 10. *And be it further enacted*, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

"SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

"SEC. 12. *And be it further enacted*, That the acceptance of the terms, conditions and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of Interior.

"SEC. 13. *And it be further enacted*, That the directors of said company shall make and publish an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least

six of the directors, a copy of which shall be deposited in the office of said Secretary of the Interior, and they shall, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

"SEC. 14. *And be it further enacted*, That the directors chosen in pursuance of the first section of this act shall, so soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

"SEC. 15. *And be it further enacted*, That the president, vice-president, and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatso-

ever which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

"SEC. 16. *And be it further enacted*, That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph lines within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Cincinnati, Saint Louis, Memphis, and Nashville, and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

"SEC. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: *Provided*, That any such grant or donation,

power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

"SEC. 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.

"SEC. 19. *And be it further enacted*, That unless the said Atlantic and Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said company to the amount of one million of dollars, with ten per centum paid, within two years after the passage of and approval of this act, it shall be null and void.

"SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act.

"SEC. 21. *And be it further enacted*, That whenever in any grant of land or other subsidies, made or hereafter to be made, to railroads or other corporations, the United States has reserved the right, or shall reserve it, to appoint directors, engineers, commissioners, or other agents to examine said roads, or act in conjunction with other officers of said company or companies, all the costs, charges, and pay of said directors,

engineers, commissioners, or agents shall be paid by the respective companies. Said directors, engineers, commissioners, or agents shall be paid for said services the sum of ten dollars per day, for each and every day actually and necessarily employed, and ten cents per mile for each and every mile actually and necessarily travelled, in discharging the duties required of them, which per diem and mileage shall be in full compensation for said services. And in case any company shall refuse or neglect to make such payments, no more patents for lands or other subsidies shall be issued to said company until these requirements are complied with.

"Approved, July 27, 1866."

Excerpt from the appropriation act of July 15, 1870, defining duties of the Surveyor-General (16 Stat. 291, 304):

"For surveying the public lands in Arizona, at rates not exceeding fifteen dollars per lineal mile for standard lines, twelve dollars for township, and ten dollars for section lines, ten thousand dollars: *Provided*, That it shall be the duty of the surveyor-general of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory under the laws, usages, and customs of Spain and Mexico; and for this purpose he shall have all the powers conferred, and shall perform all the duties enjoined upon the surveyor-general of New Mexico by the eighth section of an act entitled 'An act to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes,' approved July twenty-second, eighteen hundred and fifty-four, and his report shall be laid before Congress for such action thereon as shall be deemed just and proper."

Excerpt from the appropriation act of March 3, 1871 (forbidding treaties with Indian tribes), 16 Stat. 544, 566, Sec. 71, Title 25, U. S. C. A.:

"* * * *Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall

be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *Provided, further,* That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."

Act of April 20, 1871 (17 Stat. 19):

"CHAP. XXXIII.—An Act to enable the Atlantic and Pacific Railroad Company to mortgage its road.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Atlantic and Pacific Railroad Company, organized under act of Congress of July twenty-seven, eighteen hundred and sixty-six, is hereby authorized to make and issue its bonds in such form and manner, and for such sums, payable at such times and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: *Provided,* That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertaining to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage.

"Approved, April 20, 1871."

Act of June 22, 1874 (18 Stat. 194), Chap. 400, "An act for the relief of settlers on railroad lands":

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress*

assembled, That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend the lands reserved in any land grant made for railroad purposes: *And provided further*, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local land-office of the withdrawal of such lands from market."

Excerpt from the appropriation act of July 31, 1876 (19 Stat. 102, 121):

"* * * *And provided further*, That before any land granted to any railroad company by the United States shall be conveyed to such company, or any persons entitled thereto under any of the acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest."

Act of July 6, 1886 (24 Stat. 123):

"CHAP. 637.—An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the lands, excepting the right of way and the right, power, and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and co-terminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits as contemplated to be constructed under and by the provisions of the said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be and the same are hereby, declared forfeited and restored to the public domain."

Act of July 10, 1886 (24 Stat. 143):

"CHAP. 764.—An act to provide for taxation of railroad-grant lands, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories, and municipal corpo-

rations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed: *Provided*, That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands: *Provided further*, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads, and in organized counties: *Provided further*, That at any sale of lands under the provisions of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto.

"SEC. 2. That if any railroad corporation required by law to pay the costs of surveying, selecting, or conveying any lands granted to such c[illegible]any or for its use and benefit by act of Congress s[illegible]or thirty days neglect or refuse to pay any such [illegible] after demand for payment thereof by the Secreta[illegible]of the Interior, he shall notify the Attorney-General, who shall at once commence proceedings to collect the same. But when any sum shall be collected of such railroad company as costs of surveying, selecting, and conveying any tract of land which shall have been purchased under the provisions of section one hereof, the Secretary of the Interior shall out of such collections reimburse said purchaser, his heirs or assigns, the amount of money paid by him as the costs of such surveying, selecting, and conveying.

"SEC. 3. That this act shall not affect the right of the Government to declare or enforce a forfeiture of any lands so granted; but all the rights of the United States to said lands or to any interest therein shall be and remain as if this act had not passed, except as to the lien mentioned in the first section hereof.

"SEC. 4. That section twenty-one of chapter two hundred and sixteen, approved July second, eighteen hundred and sixty-four, is hereby so amended as that the costs of surveying, selecting and conveying therein required to be paid shall become due and payable at and on the demand therefor made by the Secretary of the Interior as provided in section two of this act, and nothing in this act shall be construed or taken in any wise to affect or impair the right of Congress at any time hereafter further to alter, amend, or repeal the said act, as in the opinion of Congress, justice or the public welfare may require, or to impair or waive any right or remedy in the premises now existing in favor of the United States. This act shall be subject to alteration, amendment, or repeal."

Excerpts from general allotment act of February 8, 1887 (24 Stat. 388):

"CHAP. 119—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: • • •

"SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or un-

surveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

"SEC. 5. • • • *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress."

Act of March 3, 1887 (24 Stat. 556):

"CHAP. 376.—An act to provide for the adjustment of land grants made by Congress to aid in the con-

struction of railroads and for the forfeiture of unearned lands, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

"SEC. 2. That if it shall appear, upon the completion of such adjustments respectfully [*sic*], or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

"SEC. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not

renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

"SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land-office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United

States may have on account of any breach of said conditions.

"SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

"SEC. 6. That where any such lands have been sold and conveyed, as the property of any railroad company, for the State and county taxes thereon, and the grant to such company has been thereafter forfeited, the purchaser thereof shall have the prior right, which shall continue for one year from the approval of this act, and no longer, to purchase such lands from the United States at the Government price, and patents for such lands shall thereupon issue. *Provided*, That said lands were not, previous to or at the time of the taking

effect of such grant, in the possession of or subject to the right of any actual settler.

"SEC. 7. That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State corporation or individual would be rightfully entitled.

"Approved, March 3, 1887."

Act of August 29, 1890 (26 Stat. 369):

"CHAP. 819.—An act to amend an act entitled 'An act for the relief of settlers on railroad lands,' approved June twenty-second, eighteen hundred and seventy-four.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the privileges granted by the aforesaid act approved June twenty-second, eighteen hundred and seventy-four, are hereby extended (subject to the provisos, limitations, and restrictions thereof) to all persons entitled to the right of homestead or pre-emption under the laws of the United States, who have resided upon and improved for five years lands granted to any railroad company, but whose entries or filings have not for any cause been admitted to record."

Act of March 3, 1891 (26 Stat. 854):

"CHAP. 539.—An act to establish a court of private land claims, and to provide for the settlement of private land claims in certain States and Territories.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there shall be, and hereby is, established a court to be called the court of private land claims * * *."

"SEC. 6. That it shall and may be lawful for any person or persons or corporation, or their legal representatives, claiming lands within the limits of the territory derived by the United States from the Re-

public of Mexico and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado or Wyoming by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States which at the date of passage of this act have not been confirmed by the act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, in every such case to present a petition, in writing, to the said court in the State or Territory where said land is situated and where the said court holds its sessions, but cases arising in the States and Territories in which the court does not hold regular sessions may be instituted at such place as may be designated by the rules of the court. * * *"

"SEC. 7. That all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States, except that the answer of the attorney of the United States shall not be required to be verified by his oath, and except that, as far as practicable, testimony shall be taken in court or before one of the justices thereof. The said court shall have full power and authority to hear and determine all questions arising in cases before it relative to the title to the land the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe-Hidalgo, on the second day of February, in the year of our Lord, eighteen hundred and forty-eight, or the treaty concluded between the same powers at the city of Mexico, on the thirtieth day of December, in the year of our Lord, eighteen hundred and fifty

three, and the laws and ordinances of the Government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States, which decree shall in all cases refer to the treaty, law, or ordinance under which such claim is confirmed or rejected; and in confirming any such claim, in whole or in part, the court shall in its decree specify plainly the location, boundaries, and area of the land the claim to which is so confirmed.

"SEC. 8. That any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title derived from the Spanish or Mexican Government that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for a confirmation of such title; and on such application said court shall proceed to hear, try, and determine the validity of the same and the right of the claimant thereto, its extent, location and boundaries, in the same manner and with the same powers as in other cases in this act mentioned.

"If in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby. * * *"

"SEC. 12. That all claims mentioned in section six of this act which are by the provisions of this act authorized to be prosecuted shall, at the end of two years

from the taking effect of this act, if no petition in respect to the same shall have then been filed as hereinbefore provided, be deemed and taken, in all courts and elsewhere, to be abandoned and shall be forever barred: * * *"

"SEC. 13. That all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act, namely:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect.

"Second. No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place." * * *

Act of March 2, 1896 (29 Stat. 42):

"CHAP. 39.—An Act To provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one

of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed; *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

"SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter or at his op-

tion, as prescribed in sections three and four of chapter three-hundred and seventy-six of the Acts of the second session of the Forty-ninth Congress.

"SEC. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified."

Act of March 3, 1897 (29 Stat. 622):

"CHAP. 374.—An Act To define the rights of purchasers under mortgages authorized by an Act of Congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever any mortgage made by the Atlantic and Pacific Railroad Company under and by virtue of Acts of Congress is foreclosed in any court of the United States, or of any State or Territory thereof, and any sale of the road, equipment

lands, franchises, privileges, and other rights and property covered by said mortgage is made under a decree or decrees of such courts, the purchaser at any such sale or sales, and their associates or assigns, shall constitute a new company, which shall have and shall be entitled to hold and possess the franchises and property so sold, and to exercise the same rights, powers, privileges, grants, and franchises, including the franchise to be a corporation, granted by the Act of Congress approved July twenty-seventh, eighteen hundred and sixty-six, incorporating the Atlantic and Pacific Railroad Company, and by acts amendatory thereof and supplemental thereto, which were owned and possessed by said Atlantic and Pacific Railroad Company, or said mortgagees at the time of such decree of foreclosure; and the incorporation as hereby provided shall be completed and become effective whenever the said purchasers and their associates or assigns shall file with the Secretary of the Interior a certificate of incorporation hereunder, duly acknowledged, specifying the name of such new corporation, its president, and the names of its directors, the amount of its proposed capital stock and bonds, together with a certified copy of the decree or decrees ratifying such sale; but such new company shall be subject to all the obligations and duties to the United States which said Atlantic and Pacific Railroad Company was subject under its charter or Act of incorporation, and nothing in this Act shall be held to deprive the United States of any right or remedy they may at any time have had against said Atlantic and Pacific Railroad Company; but nothing in this Act shall make such purchasers and their associates or such new corporation liable for any debts or claims or contracts of the old corporation except all debts, demands and liabilities which were due or owing by the old company, which were contracted, accrued, or were incurred or are due or owing for tickets and freight balances, or for wages, work, labor, materials, machinery, fixtures, and supplies of every kind and character, done, performed, or furnished in the repair, equipment, operation, or extension of said road and its branches

so purchased, and all liabilities incurred by said old company in the transportation of freight and passengers thereon, including damages for injuries to employees or other persons, and to property, and which debts, demands and liabilities have accrued or upon which suit had been brought or was pending, or judgment rendered, within twelve months prior to the appointment of a receiver or receivers in the foreclosure proceeding or since the appointment of any such receiver, but such liabilities shall not include any liabilities to other railroad companies except for tickets and freight balances: *Provided*, The capital stock of the corporation herein authorized shall be divided into shares each of the par value of one hundred dollars, and shall not exceed the amount of the mortgage debt due and unpaid at the time of the decree of foreclosure: *Provided*, That additional stock and bonds may be issued by the corporation upon the payment into its treasury therefor the full par value thereof in cash. No stock shall be issued until the Secretary of the Interior shall approve its issue and certify that it is issued in conformity to the provisions of this Act. The total stock issued under the provisions of this Act shall not exceed one hundred million dollars. But no stock shall be issued by said corporation until such issue shall be approved by the Secretary of the Interior as actually representing money, labor or property, estimated at its actual cost value, at the full or par value of said issue of stock: *Provided further*, That nothing herein contained shall be construed as making any additional grant of lands or other franchises to such successor corporation, or as a waiver of any rights of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Atlantic and Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Atlantic and Pacific Railroad Company or of any purchaser or purchasers of said lands from said company: *Provided further*, That as a condition precedent to reorganization the purchasers of the railroad property and their associates shall relinquish

in writing and convey to the United States (by a proper deed or instrument to be filed with and approved by the Secretary of the Interior within six months after the passage of this Act and before this Act shall take effect) all claims, right, title and interest to all lands granted to the Atlantic and Pacific Railroad Company embraced within both the granted and indemnity limits, which were adjacent to and coterminous with the uncompleted portions of the road on the sixth day of July, eighteen hundred and eighty-six: *And provided further*, That in every case of failure of the title to any lands conveyed or contracted to be sold by said Atlantic and Pacific Railroad Company to any bona fide settler and occupant in a tract of six hundred and forty acres or less any and all rights of such purchaser or his assigns, in respect of such land, or in respect of the failure of such title, or in respect to the liability of said Atlantic and Pacific Railroad Company on any such contract, shall survive and may be enforced against such successor company with the same force and effect and in the same manner as against the Atlantic and Pacific Railroad Company; and such successor company, upon making compensation for such loss of title or failure to comply with the conditions of any such land contract, shall be subrogated to the rights of such purchaser in respect of the lands for which such compensation shall have been made: *And provided further*, That in case any uncompleted contracts for the purchase of land shall be pending at the time of such foreclosure sale, such new company shall, upon payment to it of any unpaid balance of purchase money for such land at the time provided in such contracts for the sale thereof, convey and release to the holders of such contracts all its title, interest, and estate in and to the land embraced in such contracts.

"SEC. 2. Where the line of such railway is now located within the limits of any state, or where such line is now located within a territory which may hereafter become a state, such state or such territory, when it shall become a state, shall be empowered to require such corporation to become incorporated with-

in such state or states as may be provided by the laws thereof.

"SEC. 3. That Congress shall at all times have the power to alter, amend, or repeal this Act.

"Approved, March 3, 1897."

Act of June 27, 1902 (32 Stat. 405):

"CHAP. 1159.—An Act Authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad property and franchises, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Santa Fe Pacific Railroad Company, a corporation incorporated under the Act of Congress approved March third, eighteen hundred and ninety-seven, entitled 'An Act to define the rights of purchasers under mortgages authorized by an Act of Congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company,' be, and it hereby is, authorized and empowered to sell or lease its railroad and other property, including all rights, powers, privileges, grants, and franchises, to the Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas, its successors and assigns; but such purchaser or lessee shall take, hold, and use the railroad and property sold or leased subject to all duties, obligations, conditions, and restrictions relating thereto which at the time of such sale or lease shall be binding upon said Santa Fe Pacific Railroad Company as fully as though such sale or lease had not been made; and thereupon such purchaser or lessee shall have and enjoy all rights, powers, privileges, grants, and franchises relating to said railroad and property, or any part thereof, that were conferred by Congress upon said Santa Fe Pacific Railroad Company: *Provided, however*, That said railroad shall remain as heretofore a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

and subject also to all other rights of the United States.

"SEC. 2. That from and after the passage of this Act the said Santa Fe Pacific Railroad Company, its successors or assigns, shall pay an annual tax at the rate of one hundred and seventy-five dollars per mile to the Territories of New Mexico and Arizona, respectively for each mile of main track in said Territories, respectively, the same to be apportioned among the counties of said Territories in which said railroad is located according to the mileage in each county, respectively, and said taxes shall be in lieu of all other taxes on said property hereby authorized to be leased or sold and the rolling stock used thereon, but excepting the land-grant lands and the shops as hereinafter otherwise provided, and the payment of the said tax as to each Territory shall be made on or before the first day of December of every year after nineteen hundred and two, until it shall have been admitted into the United States of America as a State; and that upon the admission of the said Territories of New Mexico and Arizona, or either of them, as States, the property hereby authorized to be transferred, situated therein, shall be subject to all the laws and regulations of either of the said States of New Mexico or Arizona, in the same manner and to the same extent as any other railroad property situated therein. The payment of the said one hundred and seventy-five dollars a mile shall not extend to or apply to any of the land-grant lands owned by the said Santa Fe Pacific Railroad Company which are in no wise connected with the right of way and station grounds of said company, said land-grant lands to remain as now chargeable with taxes as assessed and collected under and by virtue of the laws of the said Territories of New Mexico and Arizona, and the shops situated at Albuquerque, New Mexico, including the machinery therein, and the lands upon which the same are situated, shall be assessed separately, and the taxes thereon paid annually according to the laws of New Mexico.

"SEC. 3. That the sale or lease herein authorized shall be made on or before January first, nineteen

hundred and four; otherwise this Act shall become inoperative for all purposes.

"SEC. 4. That Congress shall at all times have power to alter, amend, or repeal this Act.

"Approved, June 27, 1902."

Excerpt from the appropriations act of April 21, 1904 (33 Stat. 189, 211):

"That any private land over which an Indian reservation has been extended by Executive order, may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant, nonmineral nontimbered, surveyed public lands of equal area and value and situated in the same State or Territory."

Excerpts from the act of June 20, 1910 (36 Stat. 557):

"CHAP. 310.—An Act To enable the people of New Mexico to form a constitution and state government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original states. • • •

"SEC. 2. • • •

"And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—

"*First.* • • • and that polygamous or plural marriages, or polygamous cohabitation, and the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.

"*Second.* That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries

thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States, or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe."

Article IX, Section 2, Constitution of Arizona:

"SECTION 2. That there shall be exempt from taxation all Federal, State, county and municipal property. Property of educational, charitable and religious associations or institutions not used or held for profit may be exempt from taxation by law. Public debt, as evidenced by the bonds of Arizona, its counties, municipalities, or other subdivisions, shall also be exempt from taxation. There shall be further exempt from taxation the property of widows, honorably discharged soldiers, sailors, United States Marines, members of revenue marine service, and army nurses, residents of this state, not exceeding the amount of two thousand dollars, where the total assessment of such widow and such other persons named herein does not

exceed five thousand dollars; provided, that no such exemption shall be made for such persons other than widows unless they shall have served at least sixty days in the military or naval service of the United States during time of war, and shall have been residents of this State prior to January 1, 1927. All property in the State not exempt under the laws of the United States or under this constitution, or exempt by law under the provisions of this section shall be subject to taxation to be ascertained as provided by law. This section shall be self-executing."

Excerpt from Article XX, Arizona Constitution:

"The following ordinance shall be irrevocable without the consent of the United States and the people of this State: * * *

"Third. The sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country are forever prohibited within this State.

"Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

Act of June 25, 1910 (36 Stat. 834):

"CHAP. 406.—An Act Making an appropriation for the survey of public lands lying within the limits of land grants, to provide for the forfeiture to the United States of unsurveyed land grants to railroads, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That to enable the Secretary of the Interior to complete the adjustment of land grants made by

Congress to aid in the construction of railroads, and to subject the lands granted to taxation by States, Territories, and municipal authorities, any railroad corporation required by law to pay the costs of surveying, selecting, or conveying any lands granted to such company or corporation, or for its use and benefit, by any Act of Congress, shall be, and is hereby, required, within ninety days from demand by the Secretary of the Interior, to deposit in a proper United States depository to the credit of the United States a sum sufficient to pay the cost of surveying, selecting, and conveying any of the unsurveyed lands granted to such company, or for its use and benefit, under any act of Congress: *Provided, further*, That the Secretary of the Interior shall determine and specify in the notice or demand to such company the amount of the required deposit, and may, in his discretion, demand a sum sufficient to cover the cost of the survey, selection, and conveyance of the entire area granted to any company, or for its use and benefit, then unsurveyed, or for such townships or fractional townships as he may prescribe and designate in the notice or demand to such company, as aforesaid: *And provided further*, That the amount deposited shall, subject to the rules and regulations of the Department of the Interior, under the direction of the Commissioner of the General Land Office, be disbursed for the surveying, including office and field work, selection, and conveyance of the lands granted and designated in the notice of the Secretary of the Interior, as aforesaid: *And provided further*, That in the event the money deposited by any railroad corporation under the provisions of this act shall exceed the cost of said surveys, the said excess thereof shall be repaid to the corporations so depositing the same, or to its assigns.

"SEC. 2. That if any railroad corporation required by law to pay the costs of surveying, selecting, or conveying any lands granted to such corporation, or for its use and benefit, by any Act of Congress, shall, for ninety days from notice or demand by the Secretary of the Interior, as provided in this Act, neglect or refuse to deposit an amount sufficient to meet the expense of surveying, selecting, and conveying the unsurveyed lands

granted to such company, or for its use and benefit, by any Act of Congress, and designated in the notice or demand by the Secretary of the Interior, as aforesaid, the rights, title, and interests of such company, and all those claiming by, through, or under it, in and to the unsurveyed lands designated in the notice of the Secretary, as aforesaid, shall cease and forfeit to the United States; and the Secretary of the Interior shall notify the Attorney-General, who shall at once commence proceedings to declare the forfeiture and to restore the lands forfeited to the public domain.

"SEC. 3. That this Act shall not affect the right of the Secretary of the Interior to cause the public surveys to be extended over any lands granted to any railroad or corporation by any Act of Congress in the manner now otherwise provided by law, nor shall any claim, right, interest, or demand of the Government of the United States be waived or annulled by the provisions hereof: *Provided*, That all granted lands surveyed under the provisions of this Act shall be subject to taxation by States, Territories, and municipal authorities, and the right of the Government to reimburse itself for the survey, selection, and conveyance of such lands otherwise provided by law shall remain in full force and effect.

"SEC. 4. That the Secretary of the Interior shall prescribe such rules and regulations as will be necessary to the carrying out of the foregoing provisions.

"Approved, June 25, 1910."

Act of March 4, 1913 (37 Stat. 1007):

"CHAP. 153.—An Act For the relief of Indians occupying railroad lands in Arizona, New Mexico, or California.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and he is hereby, authorized in his discretion to request of the present claimant under any railroad land grant a relinquishment or reconveyance of any lands situated within the States of Arizona, New Mexico, or California passing under the grant which are shown to

have been occupied for five years or more by an Indian entitled to receive the tract in allotment under existing law but for the grant to the railroad company, and upon the execution and filing of such relinquishment or reconveyance the lands shall thereupon become available for allotment, and the company relinquishing or reconveying shall be entitled to select within a period of three years after the approval of this Act and have patented to it other vacant nonmineral, nontimbered, surveyed public lands of equal area and value situated in the same State, as may be agreed upon by the Secretary of the Interior, provided that the total area of land that may be exchanged under the provisions of this Act shall not exceed three thousand acres in Arizona, sixteen thousand acres in New Mexico, and five thousand acres in California.

"Approved, March 4, 1913."

Excerpt from the appropriation act of June 30, 1913 (38 Stat. 77-78):

"For the survey, resurvey, classification, appraisement, and allotment of lands in severalty under the provisions of the Act of February eighth, eighteen hundred and eighty-seven, entitled 'An Act to provide for the allotment of lands in severalty to Indians,' and under any other Act or Acts providing for the survey and allotment of lands in severalty to Indians; and for the survey and subdivision of Indian reservations and lands to be allotted to Indians under authority of law, $200,000, to be repaid proportionately out of any Indian moneys held in trust or otherwise by the United States and available by law for such reimbursable purpose and to remain available until expended; *Provided*, That no part of said sum shall be used for survey, resurvey, classification, appraisement, or allotment of any land in severalty upon the public domain to any Indian, whether of the Navajo or other tribes, within the State of New Mexico and the State of Arizona."

Excerpt from the appropriation act of May 25, 1918 (40 Stat. 561, at 570):

"That hereafter no Indian reservation shall be

created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress." (Sec. 211, Title 25, U. S. C. A.)

Act of August 24, 1922 (42 Stat. 829):

"CHAP. 285.—An Act To Permit adjustment of conflicting claims to certain lands in Mohave County, Arizona.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and he is hereby, authorized and empowered, in his discretion, to accept a relinquishment from the owners of the odd-numbered sections of land falling within townships sixteen, sixteen and one-half, and seventeen north of range thirteen west, Arizona, and permit said owners to select and receive in exchange therefor patents of an equal area of vacant surveyed, nonmineral, nontimbered public land of the United States in the county of Mohave, State of Arizona.

"Approved, August 24, 1922."

Act of February 20, 1925 (43 Stat. 954):

"CHAP. 273.—An Act To provide for exchanges of Government and privately owned lands in the Walapai Indian Reservation, Arizona.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior is hereby authorized, in his discretion, under rules and regulations to be prescribed by him, to accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation in Mohave and Coconino Counties, Arizona, and to permit lieu selections within the boundaries of the said reservation by those surrendering their rights so that the lands retained for Indian purposes may be consolidated and held in a solid area so far as may be possible: *Provided*, That the title or claim of any person or company who

refuses to reconvey to the Government shall not be hereby affected.

"Approved, February 20, 1925."

Excerpts from the Taylor Grazing Act (48 Stat. 1269, 49 Stat. 1976), Title 43, U. S. C. A., Section 315 *et seq.*:

"Sec. 315. Grazing districts; establishment; restrictions; prior rights; rights of way; hearing and notice; hunting or fishing rights

"In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this chapter, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access

by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this chapter nor sections 291 to 301 of this title, commonly known as the 'Stock Raising Homestead Act,' shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 471 of Title 16, for the purposes set forth in section 475 of Title 16, or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however*, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this chapter shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district. (June 28, 1934, c. 865, § 1, 48 Stat. 1269, as amended June 26, 1936, c. 842, Title I, § 1, 49 Stat. 1976.)

"Sec. 315a. Protection, administration, regulation and improvement of districts; rules and regulations; study of erosion and flood control; offenses

"The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accom-

plish the purposes of this chapter and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this chapter, through such funds as may be made available for that purpose, and any willful violation of the provisions of this chapter or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500. (June 28, 1934, c. 865, § 2, 48 Stat. 1270.)

"Sec. 315b. Grazing permits; fees; vested water rights; permits not to create right in land

"That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: *Provided*, That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights, owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations

laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further*, That nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands. (June 28, 1934, c. 865, § 3, 48 Stat. 1270.)"

* * *

"**Sec. 315f. Homestead entry within district or withdrawn lands; classification; preferences**

"The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and

forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: Provided, That locations and entries under the mining laws sections 181 to 194, 201 to 208, 211 to 214, 221, 223 to 229, 241, 251, and 261 to 263 of Title 30, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this chapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: Provided, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided. (June 28, 1934, c. 865, § 7, 48 Stat. 1272 as amended June 26, 1936, c. 842, Title I, § 2, 49 Stat. 1976.)"

• • •

"Sec. 315i. Disposition of moneys received; availability for improvements

"Except as provided in sections 315h and 315j of this title, all moneys received under the authority of this chapter shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received under this chapter during any fiscal year is hereby made available, when ap-

propriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received under this chapter during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts or the lands producing such moneys are situated, to be expended as the State Legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts or the lands producing such moneys are situated: Provided, That if any grazing district or any leased tract is in more than one State or county, the distributive share to each from the proceeds of said district or leased tract shall be proportional to its area in said district or leased tract. (June 28, 1934, c. 865, § 10, 48 Stat. 1273, as amended June 26, 1936, c. 842, Title I, § 4, 49 Stat. 1978.)

"Sec. 315j. Appropriation of moneys received; application of public land laws to Indian ceded lands; application for mineral title to lands

"When appropriated by Congress, 25 per centum of all moneys received from each grazing district on Indian lands ceded to the United States for disposition under the public-land laws during any fiscal year is hereby made available for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements; and an additional 25 per centum of the money received from grazing during each fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said lands are situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county or counties in which such grazing lands are situated. And the remaining 50 per centum of all money received from such grazing lands shall be deposited to the credit of the Indians pending final disposition under applicable laws, treaties, or agreements. The applicable public land laws as to said Indian ceded lands within a district created under this chapter shall continue in operation, except that each and every application for nonmineral title to said lands in a district created under this chapter shall be al-

lowed only if in the opinion of the Secretary of the Interior the land is of the character suited to disposal through the chapter under which application is made and such entry and disposal will not affect adversely the best public interest, but no settlement or occupation of such lands shall be permitted until ninety days after allowance of an application. (June 28, 1934, c. 865, § 11, 48 Stat. 1273.)"

Excerpt from the appropriation act of May 9, 1935 (49 Stat. 176, at 183):

"* * * *Provided*, That within the States of Arizona and Wyoming no part of said sum shall be used for the acquisition of lands outside of the boundaries of existing Indian reservations."

PART III.

Typical Examples of Statutes Affecting Territories Not Acquired From Mexico.

An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio (see 1 Stat. 51, footnote) provided, in Article III of the Articles of Compact:

"Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

Excerpts from Act of March 2, 1861 (12 Stat. 239):

"CHAP. LXXXVI.—*An Act to provide a temporary Government for the Territory of Dakota, and to create the Office of Surveyor General therein.*

"* * * *Provided*, That nothing in this act contained

shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Dakota, until said tribe shall signify their assent to the President of the United States to be included within the said Territory, or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed: * * *."

Excerpts from Act of August 14, 1848 (9 Stat. 323):

"CHAP. CLXXVII.—*An Act to establish the Territorial Government of Oregon.* * * *

"SEC. 14. *And be it further enacted,* That the inhabitants of said Territory shall be entitled to enjoy all and singular the rights, privileges, and advantages granted and secured to the people of the territory of the United States north-west of the River Ohio, by the articles of compact contained in the ordinance for the government of said territory, on the thirteenth day of July, seventeen hundred and eighty-seven; and shall be subject to all the conditions, and restrictions, and prohibitions in said articles of compact imposed upon the people of said territory; * * *."

PART IV.

Proceedings Under the Transportation Act of 1940.

(Public—No. 785—76th Congress)
(Chapter 722—3d Session)
(S. 2009)

AN ACT.

To amend the Act to regulate commerce, approved February 4, 1887, as amended, so as to provide for unified regulation of carriers by railroad, motor vehicle, and water, and for other purposes.

* * *

TITLE III—MISCELLANEOUS.

Part II—Rates on Government Traffic.

SEC. 321. (a) * * *

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an

innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

Approved, September 18, 1940.

RELEASE.

Santa Fe Pacific Railroad Company, a corporation organized and existing by virtue of an Act of Congress approved March 3, 1897 (29 Stat. 622), with office and principal place of business at New York, in the State of New York, hereby, in accordance with section 321 of Part II of Title III of the Transportation Act of 1940, and the rules and regulations issued thereunder by the Secretary of the Interior, relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

This release does not embrace the rights of way or station grounds of this company, lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

IN WITNESS WHEREOF, Santa Fe Pacific Railroad Company has caused this Release to be signed in its corporate name and acknowledged or proved by its President and its corporate seal to be hereunto affixed and the same to be attested by the signature of its Secretary, this 17th day of December, 1940.

SANTA FE PACIFIC RAILROAD COMPANY,
By (Sgd) E. J. ENGEL,
Its President.

(Seal)

Attest:
(Sgd) R. M. HOGIN,
Its Secretary.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

On this 17th day of December, 1940, before me, the undersigned George Julius Howard a notary public within and for the county aforesaid, appeared E. J. Engel and R. M. Hogin, to me personally known, who, being by me severally and duly sworn, did say that he, the said E. J. Engel, is the President, and he, the said R. M. Hogin, is the Secretary, of Santa Fe Pacific Railroad Company, the corporation which executed the foregoing instrument, and that the seal affixed thereto is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and the said E. J. Engel, as President as aforesaid, and the said R. M. Hogin, as Secretary as aforesaid, acknowledged before me the said instrument to be the free act and deed of said corporation, and acknowledged that they, as President and Secretary respectively, executed the said instrument on behalf of said corporation for the purpose and consideration therein expressed.

WITNESS my hand and notarial seal this 17 day of December, 1940.

(Signed) GEORGE JULIUS HOWARD,
Notary Public.

My commission expires March 30, 1941.

LAND DIVISION.

Jan. 4, 1941

Hon. Fred A. Johnson,
Commissioner of the General Land Office.

MY DEAR MR. JOHNSON:

This will refer to the releases of land grant claims filed by the Atchison, Topeka and Santa Fe Railway Company and the Santa Fe Pacific Railroad Company, pursuant to the Act of September 18, 1940 (Public No. 785—76th Congress), and the regulations prescribed thereunder.

The statute provides that if a land grant railroad desires to receive the benefit of the Act, it is required to file with the Secretary of the Interior in the form and manner prescribed by him, a release of any claim it may have to lands, interests in lands, compensation or reimbursement on account of lands or interests in lands so granted, claimed to have been granted or claimed should have been granted. The Act does not require the reconveyance of land already patented or certified or prevent the issuance of patents for land listed or selected where the listing or selection was fully and finally approved by the Secretary of the Interior prior to September 18, 1940, to the extent that the issuance of such patents may be authorized by law.

The odd numbered sections of land within the Walapai Indian Reservation, Arizona, are unpatented and are not within the exceptions to the aforesaid Act, but said sections are claimed by the Santa Fe Pacific Railroad Company, which claim is now being contested by the United States in the Courts. The Act does require the Railroad to release its claim to such sections if it intends to receive the benefits of said Act.

It is assumed by this Office that the releases submitted do cover the odd numbered sections of land within the

Walapai Indian Reservation. Otherwise there would appear to be an evasion of compliance with the specific language contained in the Act. Therefore, to avoid any controversy in the future as to whether the releases cover the odd numbered sections of land in the Walapai Indian Reservation, it is requested that any official action by your office, relative to accepting the releases, be held in abeyance and that the Companies be required to indicate formally, in writing, that the odd numbered sections of land within the Walapai Indian Reservation are covered by the releases tendered.

Sincerely yours,

(Signed) JOHN COLLIER,

Commissioner.

JMS:ds

1-3-41

cc: Mr. Lawrence Cake,
Local Representative Santa Fe
Pacific Railroad Company,
Woodward Building,
Washington, D. C.

LAWRENCE CAKE
Attorney and Counsellor at Law
Woodward Building
Washington, D. C.

January 6, 1941.

The Commissioner of the General Land Office,
Washington, D. C.

SIR:

Referring to informal conference with Mr. Havell regarding the release of land-grant claims filed by the Santa Fe Pacific Railroad Company in accordance with Section 321, Part II, Title III of the Transportation Act of 1940 and the regulations thereunder promulgated in Circular No. 1480, and to letter dated January 4, 1941 from the Commissioner of Indian Affairs regarding the attitude of the company toward the unpatented odd-numbered sections within the Walapai Indian Reservation, I have to advise that I have communicated with the company and have been informed that the lands in question within the Walapai Reservation are intended to be and are included in the release which has been filed. I was given this assurance by telephone on Saturday and later I received the enclosed telegram from Charles H. Woods, General Solicitor, Santa Fe Pacific Railroad Company.

Respectfully,
(Signed) LAWRENCE CAKE.

Enc:

UNITED STATES DEPARTMENT OF THE INTERIOR.
Office of the Secretary,
Washington.

Jan. 15, 1941.

Charles H. Woods, Esquire,
General Solicitor,
The Atchison, Topeka and Santa Fe Railway System,
1211 Railway Exchange
Chicago, Illinois.

MY DEAR MR. WOODS:

On December 18, you, together with Lawrence Cake, Esquire, filed releases of land grant claims executed on December 17 by the Atchison, Topeka and Santa Fe Railway Company and the Santa Fe Pacific Railroad Company under Section 321(b), Part II, Title III, Transportation Act of 1940, and Circular No. 1480, the regulations governing such releases. The Santa Fe Pacific Railroad Company owns the land grant involved, and the Railway Company *supra* operates the line of railroad and owns the Railroad Company. The land grant has not been adjusted and closed.

The Railroad Company has filed a list containing the names of all innocent purchasers of unpatented lands prior to September 18 together with a description of such lands. Section 273.65(c). The Land Commissioner of the company made affidavit on December 12 that other than the lands in the above list no unpatented grant lands have been sold or are otherwise encumbered.

Where a grant has not been finally adjusted and closed, the release must be recorded in each county where the released lands or interests are situated. Section 273.65(d), Circular No. 1480. Also, the release should be supported by certificates from the county officers to the effect that there are no tax or mortgage liens or other encumbrances

of record affecting any of the lands reconveyed to the United States. Section 273.65(e), Circular No. 1480.

The release of the Santa Fe Pacific Railroad Company is enclosed herewith in order that it may be recorded in conformity with Section 273.65(d), Circular No. 1480.

For the purpose of the record it is requested that the companies file in this Department a document executed and acknowledged by an authorized officer or officers of the companies, acknowledging and certifying that the releases heretofore submitted are intended by the companies to, and do, relinquish and quit claim to the United States of America, among other lands, all unpatented lands of the companies, or claimed by the companies under the act of July 27, 1866 (14 Stat. 292), within the Walapai Indian Reservation in Arizona, and which are included in the case of *United States* v. *Santa Fe Pacific Railroad Company*, pending in the Federal Courts.

Upon the return hereof, with evidence of recordation and the evidence required by Section 273.65(e), and the preceding paragraph hereof, the matter of the approval of the release will be given prompt consideration.

Sincerely yours,

(Sgd) Oscar L. Chapman,
Assistant Secretary.

Enclosure 59772.

INDENTURE OF FURTHER ASSURANCE.

INDENTURE of further assurance made this 23d day of January, 1941, by SANTA FE PACIFIC RAILROAD COMPANY, a corporation organized and existing under and by virtue of an act of Congress approved March 3, 1897, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation organized and existing under and by virtue of the laws of Kansas (hereinafter sometimes collectively called Companies).

WHEREAS, Companies did on the 18th day of December, 1940, file with the Secretary of the Interior of the United States of America releases of land grant claims executed by them, respectively, on the 17th day of December, 1940, under Section 321(b), Part II, Title III, of the Transportation Act of 1940, and Circular No. 1480, the regulations governing such releases, and

WHEREAS, said Secretary of the Interior, by letter of Oscar L. Chapman, Assistant Secretary, dated January 15, 1941, has requested Companies to execute and acknowledge by an authorized officer or officers an instrument acknowledging and certifying that the releases heretofore submitted were intended by Companies to, and do, relinquish and quitclaim to the United States of America, among other lands, all unpatented lands of Companies, or claimed by Companies under the act of July 27, 1866 (14 Stat. 292), within the Walapai Indian Reservation in Arizona, and which are included in the case of *United States* v. *Santa Fe Pacific Railroad Company* (114 Fed. (2d) 420), pending in the Federal Courts:

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That, in consideration of the premises and for the purpose of further complying with said Section 321 (b), Part II, Title III, of the Transportation Act of 1940, and Cir-

cular No. 1480, SANTA FE PACIFIC RAILROAD COMPANY and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY do each hereby acknowledge and certify that the said releases filed with the Secretary of the Interior of the United States of America on December 18, 1940, were intended to, and do relinquish and quitclaim to the United States of America, among other lands, all unpatented lands of Companies, or claimed by Companies under the act of July 27, 1866 (14 Stat. 292), within the Walapai Indian Reservation in Arizona, and which are included in the case of *United States* v. *Santa Fe Pacific Railroad Company* (114 Fed. (2d) 420), pending in the Federal Courts.

IN WITNESS WHEREOF each of the said Companies has caused these presents to be executed in quadruplicate by its officers thereunto duly authorized, its corporate seal to be hereunto affixed and attested by its Assistant Secretary this 23rd day of January, 1941.

SANTA FE PACIFIC RAILROAD COMPANY,
By (Sgd.) E. J. ENGEL,
(SEAL) *President.*

Attest:
(Sgd.) G. L. GARVER,
Assistant Secretary.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
By (Sgd.) E. J. ENGEL,
(SEAL) *President.*

Attest:
(Sgd.) G. L. GARVER,
Assistant Secretary.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

On this 23rd day of January, 1941, before me, the undersigned Oscar M. Carlson, a notary public within and for the county aforesaid, appeared E. J. Engel and G. L. Garver, to me personally known, who, being by me severally and duly sworn, did say that he, the said E. J. Engel, is the President, and he, the said G. L. Garver, is the Assistant Secretary, of Santa Fe Pacific Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, the corporations which executed the foregoing instrument, and that the seals affixed thereto are the corporate seals of said corporations, and that the said instrument was signed and sealed in behalf of said corporations by authority of their Boards of Directors; and the said E. J. Engel, as President as aforesaid, and the said G. L. Garver, as Assistant Secretary as aforesaid, acknowledged before me the said instrument to be the free act and deed of said corporations, and acknowledged that they, as President and Secretary respectively, executed the said instrument on behalf of said corporations for the purposes and consideration therein expressed.

Witness my hand and notarial seal this 23rd day of January, 1941.

(Sgd.) OSCAR M. CARLSON,
Notary Public.

My commission expires October 28, 1942.

In reply refer to 1821166 "F"

Address only the
Commissioner of
the General Land Office

UNITED STATES DEPARTMENT OF THE INTERIOR
General Land Office
Washington

Feb. 25, 1941

The Secretary of the Interior,

SIR:

On December 18, 1940, The Atchison, Topeka and Santa Fe Railway Company and the Santa Fe Pacific Railroad Company filed releases of land grant claims executed on December 17, 1940, under Section 321b, Part II, Title III, of the Transportation Act of 1940, and the regulations of October 10, 1940, Circular No. 1480, governing such releases, accompanied by a list of the unpatented lands sold to innocent purchasers for value, as prescribed by Section 273.65(c), Circular No. 1480, and an affidavit by the Land Commissioner of the companies that, other than these sales, there are no encumbrances or liens.

The land grant was made to the Atlantic and Pacific Railroad Company. The line of railroad extends from Isleta, New Mexico, to the Colorado River, in Arizona, in the vicinity of Needles, California. The railroad is now owned and operated by The Atchison, Topeka and Santa Fe Railway Company. The successor to the land grant is the Santa Fe Pacific Railroad Company. Evidence of the successorship, and of the authority for the execution of the releases is with the record.

On January 27, 1941, the companies filed a bond to indemnify for tax liens against the lands surrendered.

Evidence showing that the release by the Santa Fe Pacific Railroad Company has been recorded in the counties

where the surrendered lands lie was filed on February 17, 1941, accompanied by certificates of the County Clerks that no encumbrances or liens are of record and certificates by the County Treasurers that all taxes which have been assessed or which could operate as a lien have been paid.

The releases conform to the law and the regulations, and I recommend that they be approved. The approval of this letter constitutes the approval of the releases.

Very respectfully,

(Sgd.) FRED W. JOHNSON,
Commissioner.

Approved: Mar. 1, 1941.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

PART V.

A RECITATION OF THE DETAILED LEGISLATIVE AND ADMINISTRATIVE HISTORY BOTH PRIOR AND SUBSEQUENT TO THE GRANT ACT OF 1866.

A. Conclusively Showing a Clear Intent on the Part of Congress Negativing the Existence of Any Grants to or the Recognition of Any Rights in the Walapai Bands of Indians Based Solely Upon Possession.

1. The cession of territory following the successful termination of the Mexican War finds expression in the Treaty of Guadalupe Hidalgo (1848, 9 Stat. 922). Excerpts from this treaty are set forth at pages 3-6, *supra*. The last paragraph of the second section of the protocol, page 5, reads:

> "Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, * * *"

2. Kearney's Law of 1847, adopted as a part of the New Mexican laws of 1852, is set forth at pp. 8-9, *supra*.

3. In 1850 Congress sent William Carey Jones to ascertain what private rights existed which the United States was bound to respect, and what lands belonged to the United States subject to its disposal. He reported that in the wild and wandering tribes the Spanish-Mexican law recognized no right. Senate Document 18, 31st Cong., 2nd Sess., Vol. 3, 1850-51, p. 34.

4. By act of September 9, 1850, the Territory of New Mexico, including the physical boundaries of Arizona, was created. This act, excerpts from which appear at pages 9-12, *supra*, created a full territorial government covering all rightful subjects of legislation but prohibited the pass-

ing of any law interfering with the primary disposal of the soil, and prohibited taxation of the property of the United States.

5. March 3, 1851, Congress passed an act to ascertain and settle the private land claims in the State of California (p. 12, *supra*). This act, while limited to the territory embraced within California, is mentioned because in the first place it covers similar territory ceded from Mexico and because Congress evinced a similar policy later on with respect to Arizona and New Mexico.

6. In 1852 the Senate of the United States rejected eighteen treaties which had been entered into with various Indian tribes in California. These treaties recognized and created possessory rights in California tribes to the lands used and possessed, to the exclusion of other tribes. The rejection of these treaties by the Senate was because these Indians had no rights to the soil and the Senate did not desire to create any. See Report of Commissioner of Indian Affairs, 1869, pp. 457-8, 460-61; R. 35.

7. By act of March 3, 1853 (p. 18, *supra*), Congress extended the preemption laws of the United States over the alternate reserved sections of public lands along the lines of all the railroads in the United States, wherever public lands have been or may be granted by acts of Congress, providing that the price to be paid shall in all cases be $2.50 per acre.

8. July 22, 1854, Congress passed an act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes. This act is set forth at pages 19-24, *supra*, and, in brief, donated a quarter section to every citizen residing in those territories prior to January 1, 1853, and to citizens becoming residents prior to January 1, 1858, providing that on proof of settlement and cultivation to the satisfaction of the Surveyor-Gen-

eral, and subject to the supervision of the Secretary of the Interior, a certificate should be issued, followed by patent. Section 4 (p. 21, *supra*) provided that none of the provisions of the act should be extended to school lands, salines, military or other reservations, or lands settled on and occupied for purposes of trade and commerce, and not for agriculture, such latter purposes being governed by the townsite law of 1844.

Section 5 provided that sections numbered 16 and 36 were reserved for schools, and Section 6 provided for two townships for a university. Section 7 provided that any lands not taken under any of the previous sections should be subject to the operation of the preemption act of September 4, 1841, whether settled upon before or after the survey. Section 8 (p. 22, *supra*) had for its purpose the same object as the California act of 1851, mentioned in paragraph 5, *supra*.

Sections 10 to 13, inclusive, made provisions for the appointment of a Surveyor-General for the territories of Nebraska and Kansas. Section 12 provided that all the lands to which the Indian title has been or shall be extinguished within said Territories and Nebraska and Kansas (note here the omission of New Mexico), shall be subject to the operations of the Preemption Act of September 4, 1841. Section 13 provides that the public lands in the territories of Nebraska and Kansas to which the Indian title shall have been extinguished (note here again the omission of New Mexico) shall constitute new land districts.

9. The Commissioner of the General Land Office, with the approval of the Secretary of the Interior, instructed the Surveyor-General of New Mexico on August 21, 1854, with reference to his duties under the act of 1854, as follows:

> "It is obligatory on the Government of the United States to deal with the private land titles, and the

'pueblos,' precisely as Mexico would have done had the sovereignty not changed. We are bound to recognize all titles as she would have done—to go that far, and no further. This is the principle which you will bear in mind in acting upon these important concerns."—Donaldson, *The Public Domain*, p. 398.

10. Onward from 1854, the date of the act to establish the office of Surveyor-General, all of the Territory of New Mexico (including that of Arizona) not covered by Spanish or Mexican grants was subject to grant and sale by the United States. *Newhall* v. *Sanger*, 92 U. S. 761; *Lockhart* v. *Johnson*, 181 U. S. 516.

11. In 1857, Captain Sylvester Mowry was sent out to ascertain and report what private titles were to be respected and what lands were public and open to disposition by Congress in the Gadsden Purchase. He made report that under Spanish and Mexican law "the country occupied by the wild tribes was expressly declared to be public domain." (Report of the Commissioner of Indian Affairs, 1857, pp. 584-593, R. 33-34, R. 34-35.)

12. In 1860, the President transmitted to Congress reports of the Secretary of the Interior and Commissioner of the General Land Office showing that Indians in California had no soil rights, that there were no treaties with Arizona and California tribes, and that with respect to them the Government was free to pursue any policy which circumstances might render expedient. (S. Exec. Doc. 1, 36th Cong., 2nd Sess., pp. 34-6, 51, R. 34-35.)

13. In 1863, the Senate amended the treaty with the Taberguache band of Utes to indicate the purpose of the Government not to recognize any rights in the Indians, or to create any outside of reservations, but to Americanize the whole territory. This purpose was subsequently noted by the Court of Claims in *Hayt* v. *United States*, 38 Ct. Cl. 455, also by Kappler in the fourth volume of his monumental work on Indian Affairs, published in 1929 as Senate

Document 53, 70th Congress, 1st Session, pages 1170-71. (R. 34.)

14. In 1863, Arizona was created as a separate Territory. The laws of New Mexico were carried forward. (pp. 24-26, *supra.*)

15. In 1864, Arizona's first Superintendent of Indian Affairs, Charles D. Poston, agreed with the Chiefs of the Walapai and certain other Indians that he would try to have a reservation set aside for them at Half Way Bend on the Lower Colorado, and they agreed to accept. (R. 130.) His activities were paid for by appropriations (R. 54), which indicated a Congressional intent to force the Indians to abandon their nomadic life, become sedentary, and to desist from further obstructions of White settlements.

In 1865, Mr. Poston, then Territorial Representative to Congress, and speaking on the appropriation bill which created the Lower Colorado River Reservation as a reservation for the Indians of the Colorado and its tributaries, fully explained the meeting of the Walapai Chiefs and others, stating no treaty was made because he knew the Senate would reject it, having in mind the California Indian treaties, further stating that the Indians were not recognized as having any soil right, and urging that every motive of humanity required the creation of the reservation. (R. 130.)

16. In 1865, Congress created the Colorado River Reservation. 13 Stat. 559; p. 26, *supra.* As shown by Superintendent Leihy's report of 1866, set forth in the Report of the Commissioner of Indian Affairs for that year, House Executive Document 1, 39th Congress, 2d Session, p. 27, the Walapai were noted as coming within the jurisdiction of this reservation. Until about 1880, the Walapai are shown in the reports of the Commissioner of Indian Affairs to belong to [illegible]'s reservation. (R. 52.)

17. Long prior to 1866, settlers and miners had been

coming into this territory. See Report of Commissioner of the General Land Office for 1866, p. 371. Surveying was commenced in 1866 to accommodate these settlers and thereafter steadily progressed. The Report of the Commissioner of the General Land Office for 1869 shows that all of Arizona, with the exception of the reservation, was regarded as public domain, open to grant by Congress, and for the year ended June 30, 1873, the Commissioner of the General Land Office reported the survey of Townships 20 N. Range 22 W., 23 N. 18 W., 18 N. 5 W., and 18 N. 6 W., all included in the second cause of action. The material set forth in the Transcript of Record, pp. 41-53 shows that from the earliest time to the present, by reports transmitted by the President to Congress annually, and by appropriations by Congress for surveys, the whole country since 1854 was subject to the land laws and that the Indians never had conflicting rights.

18. The Prescott Land Office was established November 3, 1868. (R. 40.) See Donaldson, *The Public Domain*, p. 173. The Gila Land District was created February 18, 1873. Appropriations were made for the survey of public lands in Arizona in 1865, 1867, 1868, 1869, and 1870. See the latter act, p. 41, *supra*.

19. In 1866, Congress passed the granting act (p. 27, *supra*), and granted the lands here in issue, with others, to the Atlantic & Pacific Railroad Company to obtain a military and postal route to the Pacific, expedite settlement, etc.

20. In 1866-69, the Walapai and the military were at war. The Walapai were finally subdued and required to leave the settlers at peace. This war delayed the removal of the Walapai to their Lower Colorado River Reservation and also the settlement and development of the territory. (See Walapai Papers, 41-84.)

21. In 1869-74, the Walapai were kept under close military surveillance. Bancroft, *History of Arizona and New*

Mexico, pp. 561-3; 9 *New Mexico Historical Review*, pp. 174-5, 181.

22. In 1869, President Grant announced that all Indians would thenceforth be dealt with only as wards.

23. In 1870, the Surveyor General was directed by Congress to ascertain and report on the lands owned under the laws, customs, and usages of Spain and Mexico, exempted from grant and sale under the law of 1854. 16 Stat. 291, 304, p. 41, *supra*.

24. In 1871, Congress forbade further dealing with any Indians by treaty. 16 Stat. 543, 566, p. 41, *supra*.

25. In 1871, Vincent Colyer was sent out by the President with full powers to deal with the Indians. He ordered the Walapai fed at Beale Springs until it could be ascertained where they could be placed without interfering with White exploitation of mineral resources. (R. 54.)

26. In 1872 the Beale Springs feeding post was disestablished by order of General Howard. All Indians in Arizona were ordered to go on their reservation by February or to take the consequences. (See *New Merico Historical Review* and Bancroft, cited under 21.)

27. During the years 1868 to 1883, inclusive, the President transmitted reports to Congress which show (1) the Indians of Arizona were not treated as having soil rights, but as pensioners on the national bounty who were required to remain on the reservations assigned to them; (2) that the whole territory outside the Spanish-Mexican grants and the reservations was open to sale and grant; and (3) that the coming of the railroad was eagerly awaited as bringing deliverance from Indian hostility, and a rapid exploitation of the country by White settlers. (R. 41-53.)

28. The Atlantic and Pacific filed its map of definite location March 12, 1872; and the Commissioner of the General Land Office, on May 17, 1872, ordered all the odd-num-

bered sections involved in the litigation withdrawn from settlement and entry.

29. In 1874, April, the Walapai were escorted to their Reservation. There they remained until they ran away a year later. (R. 54.)

30. June 22, 1874, Congress passed an act for the relief of settlers on railroad lands. The text of this act (18 Stat. 194) is set forth at pages 42-3, *supra*.

31. 1882. The report of the Public Lands Commission, compiled by Donaldson, subsequently published in 1884 by Congress, shows that all territory acquired from Mexico had been open to settlement under the public land laws; that all of Arizona had been subject to disposition by Congress since acquired. Donaldson, *The Public Domain*, 14-15.

32. On January 4, 1883, the President ordered the Walapai Reservation set aside. *Executive Orders Relating to Indian Reservations*, Government Printing Office, 1912, page 14.

33. In 1887 the General Allotment Act was passed. This provided for the allotment of lands in severalty to Indians on the various reservations, and for the means by which Indians could procure rights outside reservations. Excerpts from the act are found at pages 46-47, *supra*.

34. In 1891, Congress passed an act to establish a court of private land claims for Arizona (pages 51-54, *supra*). This act had for its general purpose the two-fold object contained in the act of 1851 for California, namely, to ascertain the existence, validity, and boundaries of private land rights created by Mexican and Spanish law, and the complementary purpose to ascertain the public domain, not covered by such rights, and which was subject to disposition by Congress.

35. In 1899 Congress published the 18th Report of the Bureau of American Ethnology, Part II, (1896-7) which shows that from the Rio Grande to the Colorado River the

title to the lands occupied by the several Indian tribes was assumed by the United States, and that the Indians were assigned to reservations. All of Arizona is shown to have been occupied by Indians and no voluntary cessions are recorded.

36. April 21, 1904, Congress, because of the many instances in which the Executive had extended Indian reservations over privately owned property, provided that in such instances the owner of private lands should have the option to exchange them for lands in the public domain outside such reservation. 33 Stat. 189, 211; p. 62, *supra*.

37. June 20, 1910, the Enabling Act for New Mexico and Arizona was enacted. (36 Stat. 557, pp. 62-64, *supra*.)

38. The Constitution of Arizona, adopted in 1912, excerpts from which are printed at pages 63 and 64, *supra*, among other things provides as follows (Art. XX, paragraph Fourth):

> "Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries *thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty*, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." (Emphasis supplied.)

39. May 25, 1918, Congress prohibited the creation of any new or additions to old reservations in New Mexico and Arizona without an act of Congress. (40 Stat. 561, 570; p. 67, *supra*.)

40. Under the Taylor grazing act, Mohave County outside the reservation is administered as privately owned

lands and public lands. (48 Stat. 1269, 49 Stat. 1976; pp. 69-75, *supra.*)

41. On May 6, 1935, the Honorable John Collier, Commissioner of Indian Affairs, gave testimony before the Senate Committee on Indian Affairs (R. 101-107.)

The bill was passed by both houses, and became the subject of consultation between the President, the Secretary of the Interior, the Attorney General, and the Treasury Department. It was vetoed on June 30, 1936. Commissioner Collier, in March, 1937, went before the Senate Committee in connection with a bill to give the Indians gratuities and gave the reasons for the veto of the prior act. They were simple: there had never been any legal right in the Indians of the Mexican cession. To establish by the precedent of the vetoed bill that Indians in whom no rights had ever been created did have a legal right coexistent with their possession would be to involve the Treasury of the United States in untold liability (California Indians Jurisdictional Act, Hearings before the Committee on Indian Affairs, United States Senate, Seventy-fifth Congress, First Session, on S. 1651 and S. 1779, Government Printing Office, 1937.)

We call special attention to the following:

> "In other words, Spain did not recognize the possessory right except as something which might be persuasive with the sovereign to make a grant, a consideration that might enter into the making of a grant. In other words, a possessory right had no legal existence; it was merely a factor in policy. That is very well known to Senator Chavez from his knowledge of the New Mexican law." (R. 102.)

In speaking of the Treaties with the California Indians, referred to in par. 6, above, Mr. Collier gave the testimony appearing at R. 103.

B. *Conclusively Showing the Clear Intent of Congress to the Effect That in the Act of 1866 the Lands in Controversy Were Granted to the Atlantic and Pacific Railroad Company and Confirmed and Reaffirmed in Its Successor Company, the Santa Fe Pacific Railroad Company, Respondent in This Case.*

We now come to present for the consideration of the Court the legislative and administrative history of the railroad land grant.

1. Within five years after the enactment of the granting act, or on April 20, 1871 (17 Stat. 19, p. 42, *supra*), Congress passed an act permitting the Atlantic and Pacific Railroad Company to mortgage its road and other property. Pursuant to the power contained in this statute, the Atlantic and Pacific in 1880 mortgaged its property.

2. The railroad not having completed the entire line provided for in the Act of 1866, Congress passed the Act of July 6, 1886 (24 Stat. 123, p. 44, *supra*), declaring that all the lands, excepting the right of way, etc., theretofore granted to the Atlantic & Pacific, adjacent to and coterminous with the uncompleted portions of the main line, embraced within both the granted and indemnity limits, were thereby declared forfeited and restored to the public domain.

3. Congress, by act of March 3, 1897 (29 Stat. 622, pp. 56-60, *supra*), in defining the rights of purchasers under mortgages concerning the Atlantic & Pacific, enacted that when any mortgage made by the Atlantic & Pacific is foreclosed and any sale of property covered by said mortgage is made, the purchasers are to constitute a corporation with the same powers and privileges as given to the Atlantic & Pacific under the granting act. The act provided that nothing therein contained should be construed as making any additional grant of lands to such successor

corporation, or as a waiver of any rights of the United States.

The act then requires the relinquishment in writing to the United States by the purchaser of all claim to lands granted embraced within the granted indemnity limits adjacent to uncompleted portions of the road on the date of the act. It then provides for the rights of the parties in the case of failure of the title to any lands conveyed or contracted to be sold by the Atlantic and Pacific to any bona fide settler and occupant, and then provides:

> "* * * That in case any uncompleted contracts for the purchase of land shall be pending at the time of such foreclosure sale, such new company shall, upon payment to it of any unpaid balance of purchase money for such land at the time provided in such contracts for the sale thereof, convey and release to the holders of such contracts all its title, interest, and estate in and to the land embraced in such contracts."

4. Subsequently, by Act of June 27, 1902 (32 Stat. 405, pp. 60-62, *supra*), the Santa Fe Pacific, which had purchased the Atlantic & Pacific, was authorized to sell or lease its railroad and other property to The Atchison, Topeka and Santa Fe Railway Company. The act required the payment of a tax of $175 a mile to the Territories of New Mexico and Arizona in lieu of all other taxes on said property, except the land-grant lands which were to remain chargeable with taxes as assessed and collected under the laws of those Territories.

5. March 12, 1872, the map of definite location through Arizona and New Mexico was filed with the Secretary of the Interior. (R. 50.) May 17, 1872, the Commissioner of the General Land Office ordered withdrawn from settlement and other disposition all the lands the title to which then vested in the railroad and are now involved in this litigation. That order was transmitted to the land office at Prescott, Arizona, together with a plat showing the map of definite location. (R. 57.)

6. In 1874, Congress passed an act for the relief of settlers on railroad lands. (18 Stat. 194, p. 42, *supra.*)

7. In 1876, July 31, Congress provided in the appropriation act that before any land granted to any railroad company by the United States shall be conveyed to such company there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company. (19 Stat. 102, 121, p. 43, *supra.*)

This act was superseded by the act of June 25, 1910 (36 at. 834), copied in full at pages 64-66, *supra.* The history of the departmental construction under the act of July 31, 1876, down to and including the act of June 25, 1910, a period of thirty-four years, is set forth in detail, with respect to the Atlantic and Pacific and its successor, the Santa Fe Pacific Railroad Company, in the decision of *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492.

8. During the period from 1878 to 1886, the President transmitted annually to Congress reports of railroads in default, reports stating that the executive could not forfeit the land grant on account of such default and only Congress could forfeit, and that until Congress should forfeit the railroads had the right to construct and, to the extent of construction, remove the conditions subsequent from the fee of the lands owned by them.

In 1880 Attorney General Devens advised the Secretary of the Interior that until Congress elected to forfeit the company was entitled to construct, earn the lands title to which was vested in it, and that until Congress forfeited it was the duty of the President to accept the 25-mile sections as constructed and cause patents to issue to the lands. Construction commenced at Isleta in 1880 was finally completed to the Needles on the Colorado River before June 30, 1883. Progress of construction was reported annually to Congress. In 1882, the Attorney Gen-

eral of the United States gave the same advice to the President that he did to the Secretary of the Interior, mentioned above, in 1880. In December, 1882, the Secretary of the Interior reported to the House of Representatives that the land grant to the Atlantic and Pacific could only be forfeited by Congress, and transmitted copy of Attorney General Devens' opinion of 1880 above referred to. In 1883, the last 25-mile sections to the Needles were accepted by the President under Section 4 of the granting act. From this time forward the United States exacted and received, and still continues to exact and receive, rate concessions in payment for the land grant provided for by the granting act. (R. 57-60.)

9. In 1886 (24 Stat. 143, p. 44, *supra*), Congress passed an act to provide for taxation of railroad grant lands and for other purposes.

10. March 3, 1887 (24 Stat. 556, p. 47, *supra*), Congress passed an act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes.

11. On March 4, 1913 (37 Stat. 1007, p. 66, *supra*), Congress passed an act for the relief of Indians occupying railroad lands in Arizona, New Mexico, or California.

12. August 24, 1922, Congress passed an act to permit adjustment of conflicting claims to certain lands in Mohave County, Arizona. (42 Stat. 829, p. 68, *supra.*)

13. Then, as the summation of all of this legislation and executive action, there appears the act of February 20, 1925 (43 Stat. 954, p. 68, *supra*). This act was passed in pursuance of a direct and specific request of the Secretary of the Interior in a report to Congress in 1923. This report of the Secretary of the Interior is quoted in full.

"DEPARTMENT OF THE INTERIOR.

"Washington, December 6, 1923.

"*Hon. Selden P. Spencer,*
"*Chairman, Committee on Indian Affairs,*
"*United States Senate.*

"*My Dear Senator Spencer:* I have the honor to transmit herewith the draft of a bill to provide for exchanges of Government and privately owned lands in the Walapai Indian Reservation, Ariz., so that the lands retained for Indian purposes may be consolidated and held in a solid area so far as may be possible.

"The Walapai Reservation was established Executive order of January 4, 1883, and the total area thereof is approximately 731,000 acres. The title to the odd-numbered sections therein passed to the Atlantic & Pacific Railroad Co., under the provisions of the act of July 27, 1866 (14 Stat. L., p. 292). The company's grant attached on March 12, 1872, the date of the definite location of the road through the locality, this being 10 years prior to the establishment of the Indian reservation. There is therefore divided ownership within the reservation boundaries, the title to the even-numbered sections being in the Government for the Indians and the title to the odd-numbered sections being in the Santa Fe Pacific Railroad Co. as successor in interest to the Atlantic & Pacific Railroad Co.

"The act of April 21, 1904 (33 Stat. L., p. 211), provides that any private land over which an Indian reservation has been extended by Executive order may be exchanged by the owners for lands outside of the reservation, but in view of the act of May 25, 1918 (40 Stat. L., p. 570), which prohibits the creation of an Indian reservation or an addition to one already created within the States of New Mexico and Arizona except by act of Congress, this Department has held that an exchange under the act of 1904 might be considered as a violation of the spirit and intent of the act mentioned.

"Under the provisions of the act of June 25, 1910 (36 Stat. L., p. 834), the Santa Fe Railroad Co. applied to have the odd-numbered sections identified by survey. The company furnished its share of the necessary expense and the survey has been completed and approved. There is therefore no question as to the title of the railroad company to the odd sections. The identification of the railroad sections and complete passing of title has brought about a condition which causes considerable trouble and embarrassment in administering the affairs of the Walapai Indians. Before the odd-numbered sections had been actually identified by a survey and marked on the ground, the Department held that it had authority to lease as grazing districts the unsurveyed lands within the reservation and apply the rental for the benefit of the Indians; and the Indians otherwise have had practically the free and unrestricted use of their reservation lands.

"This condition has been changed, and the railroad company, through their attorneys, are alleging that the Indians are committing waste upon the company's lands by felling and removing the timber, and by grazing lands for which the company has received no benefit and given no authority. This Department has been asked to make an investigation to ascertain the extent of these unlawful acts, and it has been stated to us that the company would like a settlement of these difficulties without resorting to suit. Under the proposed bill a consolidation could no doubt be effected whereby the railroad company would relinquish a part of their odd-numbered sections and take in lieu thereof the even-numbered sections within its retained area. There would still be a divided ownership between the railroad company and the Government within the boundaries of the reservation, but the land would be held by each in practically solid areas.

"The legislation requested is similar to that authorized by the act of March 3, 1921 (41 Stat. L., p. 1239), and it is considered that a settlement of the present and future difficulties by such a method would be a good business arrangement. To allow matters to re-

main in their present condition will be the cause of constant friction between the railroad company or its grantees on the one side, and the Indians and the Government. While a consolidation would reduce by about one-half the area the Indians have heretofore used, yet under the circumstances it seems that this is the only action that should be taken to prevent future trouble. This Department would therefore be glad to see the inclosed bill or legislation similar thereto enacted into law.

"*Very truly yours,*

"HUBERT WORK,
Secretary."

The proposed bill, attached to the above letter, was enacted in identical language. (43 Stat. 954, p. 68, *supra.*)

14. In 1931, negotiations under the act of 1925 were completed, the lands of the first cause were valued, and a specific division agreed upon. This agreement included a compromise adjustment of the Peach Springs controversy, reflected in the decree entered in the Peach Springs case in 1931. The other component parts of the settlement agreement have been repudiated by the United States. See pages 65-66 of our Brief.

15. Section 321 (b) of the Transportation Act of 1940, and what has been done thereunder, has been set forth in Part IV, pp. 77-88, *supra.*

PART VI.

A SUMMARY OF INFORMATION ON OCCUPANCY PRESENTED BELOW.

The trial court was referred (R. 30-33) to the historic and public documents which demonstrate that the Walapai were originally a disunited band of non-agricultural savages, who occupied exclusively no definite territory and no place or places for any great length of time. The Walapai made their debut in white history in Father

Garces' Diary. He found them in 1776 near the site of Kingman, eating food and wearing clothes characteristic of wild nomads; but other Indians, not Walapai were to the East. Another group of Indians, called Yabipai (W. P., 4-6), was found where the 1883 reservation was subsequently located (*Ibid.*, 6-11). Garces later reports that from Diamond Creek, on the subsequently established reservation, to the Black Mountains, a stretch of country in the northwest portion of that here in issue, Yabapai-Cuercomaches were found (R. 85-9). Pedro Font, who drew a map in 1777 and was an intimate of Garces, showed Yavapai north of Walapai (R. 91). The Eighteenth Annual Report of the Bureau of Ethnology places Walapai where Font placed some, at least, of the Yavapai (R. 92-3). The American Bureau showed that Walapai inhabited lands south and west of the 1882 reservation, but were on the lands that became the reservation very slightly, if at all.

Seviches, Yavapai, and Apaches were all over the territory here at issue in historic times (R. 31-2). Lieutenant Wheeler reported that Walapai were wild and roving, and that their life had carried them "beyond the notion of anything like order even among their own people." Major Price stated they had no tribal cohesion, appearing in independent bands in their hostility to the settlers. Reference is made to the shifting pattern found generally prevalent in the Southwest by Mr. Bandelier in his studies carried on from 1880 to 1885 (R. 98-9).

We have reviewed in the brief (pp. 49 to 60) the disruption of historic habits of life occasioned by the decision of the United States that no Indian right was to be respected or accorded except in reservations. The Walapai were first driven about, finally subdued, and forced to go, in 1874, to their lower Colorado River Reservation. Thereafter, in 1875, they fled, wandered for a while, and were soon forced to abandon the life of the

chase and hunt and live in settlements on the outskirts of the railroad towns. Various official reports made from time to time showed their location and their condition. Lieutenant Colonel Brayton's census, in 1888, showed them to number 646, living at various places, mostly off the 1883 reservation, working for white people, a few of them cultivating gardens (W. P., 165-8). "The Indians work in the mines and chop wood and sell it to the mill. The women wash clothes and gather hay * * *" (W. P., 164) There were 584 of them in 1900 (W. P., 192). The School Superintendent reported in 1902:

> "The Walapai number 535. Some of them work very well and earn a living. Only the old and sick will receive food from the Government. The regular issue of rations has been abolished. They earn a living in various ways—cutting and hauling wood, doing odd jobs around the towns, working in the mines and for stockmen, and raising small gardens in the mountains in different places where water is found. But few live on the reservation, owing to the scarcity of water and the infertility of the soil." (W. P., 198.)

The Walapai Superintendent reported in 1905:

> "* * * Some of the younger Indians work for cattlemen, others work in the mines, and those who live near towns performing many odd jobs. I fear, though, that among the latter class the women are the greater wage-earners. While they are self-supporting, they are in many ways far from civilization. Nearly all have small, poorly constructed houses, made of anything and everything that can be used in the construction of a house—mud, tin cans, dry-goods boxes, poles, railroad ties, etc.
>
> "* * *
>
> "The Walapai Reservation comprises 730,880 acres of the most valueless land on earth for agricultural purposes. It is unsurveyed and unallotted. Scarcely a dozen families live on the reservation." (W. P., 201.)

The Superintendent reported in 1908:

> "While the superintendent is acting Indian agent,

we have often wondered whether there is really such a thing as the Walapai Agency. The reservation, set aside by Executive order of January 4, 1883, comprises 730,880 acres of the wildest, roughest country that ever lay in God's out-of-doors (apologies to Quayle). An Indian could not live on it if he wanted to." (W. P., 201-2.)

The Superintendent reported in 1909:

"The Walapai Indians are scattered for almost 200 miles along the Santa Fe Railroad, and do what work they can find to do. Some of them make good cowboys; some team, using the wagons which were issued to them; some few herd sheep and others do what work by the day as offers. * * * But few live on the reservation because of the lack of water and those do not live there permanently." (W. P., 202.)

The Board of Indian Commissioners reported in 1916:

"There is not to exceed 160 acres of irrigable and tillable land, but many of the Indians have squatted upon small patches off the reservation and manage to eke out a subsistence by raising small truck. Not more than 10 families reside permanently on the reserve. The remainder live near towns along the line of the A. T. & S. F. R. R., and pick up a living by working for whites. Some of the women make and sell baskets.

"According to the census just completed, there are 477 Walapais. They are just about holding their own in the matter of numbers." (W. P., 203.)

The Board of Indian Commissioners reported in 1924:

"* * * Its population of 440 Walapai Indians, with the exception of a few families, live in towns scattered along the Santa Fe Railroad for a distance of 100 miles and more. Owning as they do a great area of land, these Walapai are practically nonreservation Indians. They are more than that, for they live on lands of white men without paying rent—they are squatters. * * *

"* * *

"With few exceptions their homes are crude, hastily-thrown-together shacks, built of the odds and ends of dump piles—old boxes, bits of awning, cast-off

sheets of roofing material, and the like. These shacks are scattered over some white man's land on the outskirts of the town. Kingman, the largest city in the Walapai country, has four of these Indian squatter colonies. One of them is on the edge of the city's dump." (W. P., 204-5.)

The Board of Indian Commissioners reported in 1928:

"The Walapai Indians, numbering somewhat over 400 individuals, live on the outskirts of the small towns along the Santa Fe Railroad from Seligman on the east to Kingman and Chloride on the west, a distance of nearly 100 miles. The large Walapai Reservation of 730,880 acres is a rough, arid territory bordered on the north by the Grand Canyon of the Colorado. This land is only suitable for stock raising on a large scale, and very few Indians have ever lived on this tract, which was created for them by an executive order in 1883.

"Most of the tribe are squatters, living in ugly, dilapidated shacks built of old lumber, railroad ties, sheet iron, and any other material that may be picked up around the five or six small towns where they have been congregated for many years. • • •

"• • • Principally because of the demand for unskilled labor, the Indians are allowed to remain in their nondescript camps on the edges of town; otherwise the whites undoubtedly would have forced these unprepossessing squatters away from the neighborhood." (W. P., 208.)

The Walapai physician recommended in 1931:

"• • • A concerted effort to move these Indians from their present unsightly and unhygienic homes to acceptable sites on the reservation should be made." (W. P., 288.)

The reports since 1931 have been statistical only. They are carried under the heading "Truxton Canyon Agency," located on the school reservation created at Truxton in 1900 (W. P. 189), which has jurisdiction over this reservation and the Indians there employed and in school, and the 1883 "reservation" as well. The following table

shows the total number of Walapai, the total number residing in the jurisdiction where enrolled, and the number of those who were pupils in the Truxton boarding school:

Source and year	Total number	Total number residing in jurisdiction where enrolled	Number enrolled in boarding school
1932 Report Commissioner Indian Affairs 35, 57	437	170	95
1933 Report Secretary of Interior 115, 145	440	175	99
1934 Report Secretary of Interior 126, 156	440	177	120
1935 Report Secretary of Interior 160, 170	447	181	121
1936 Report Secretary of Interior 211, 220	444	178	126
1937 Report Secretary of Interior 252	454	321	no figures
1938 Report Secretary of Interior	no figures	no figures	no figures

The reports 1932 to date contain no more particular information about the Walapai; but they show that with the advent of the depression, the tendency of Indians was to go to their reservations because of the lack of employment opportunities outside. In 1937 the general tendency was reversed: "This may perhaps be attributed to better times, just as the reverse movement from 1930 to 1934 may be due to the depression." (1937 Report of the Secretary of the Interior, 249.) Government employment also had its effect: "After the depression is over and the emergency grants cease, what will happen to the now working Indian"? (1935 Report of the Secretary of the Interior, 118.) "The demand for women and girls for household work still continues beyond the supply—there have been more jobs for Indian women and girls at agencies, schools and hospitals, and increased employment of Indian men has meant that fewer women have had to take jobs away from home. Also, there has been an effort on the part of social workers—to raise the standards of domestic employment." (1936 Report of the Secretary of Interior, 204-205.)

PART VII.

Miscellaneous.

EXTRACTS FROM HOUSE EXECUTIVE DOCUMENT NO. 1, PART 5, 42ND CONGRESS, 3RD SESSION:

From Report of Commissioner of Indian Affairs:

"The system now pursued in dealing with the roving tribes dangerous to our frontier population and obstructing our industrial progress, is entirely consistent with, and, indeed, requires the occasional use of the military arm, in restraining or chastising refractory individuals and bands. Such a use of the military constitutes no abandonment of the 'peace policy,' and involves no disparagement of it. It was not to be expected—it was not in the nature of things—that the entire body of wild Indians should submit to be restrained in their Ishmaelitish proclivities without a struggle on the part of the more audacious to maintain their traditional freedom. In the first announcement made of the reservation system, it was expressly declared that the Indians should be made as comfortable on, and as uncomfortable off, their reservations as it was in the power of the Government to make them; that such of them as went right should be protected and fed, and such as went wrong should be harassed and scourged without intermission. * * * Such a use of the strong arm of the Government is not war, but discipline." (pp. 393-4.)

"It belongs not to a sanguine, but to a sober view of the situation, that three years will see the alternative of war eliminated from the Indian question, and the most powerful and hostile bands of today thrown in entire helplessness on the mercy of the Government. * * *

"Toward the south the day of deliverance from the fear of Indian hostility is more distant, yet it is not too much to expect that three summers of peaceful progress will forever put it out of the power of the

tribes and bands which at present disturb Colorado, Utah, Arizona, and New Mexico to acclaim consideration of the country in any other attitude than as pensioners upon the national bounty. The railroads under construction, or projected with a reasonable assurance of early completion, will multiply fourfold the striking force of the Army in that section; the little rifts of mining settlement, now found all through the mountains of the southern Territories will have become self-protecting communities; the feeble, wavering line of agricultural occupation, now sensitive to the faintest breath of Indian hostility, will then have grown to be the powerful 'reserve' to lines still more closely advanced upon the last range of the intractable tribes." (p. 397.)

"For those tribes and bands which have no reservations secured to them by treaty, from which they can hope in the course of time to realize a civilization and improvement fund, provision will still require to be made by law. Their right to endowment is none the less clear than the right of other tribes whose fortune it was to deal with the United States by treaty, before Congress put an end to the treaty system, with its many abuses, and absurdities. We have received the soil from them, and we have extinguished their only means of subsistence. Nothing in the history of the United States justifies the belief that either Congress or the country will be wanting in justice or generosity in dealing with the necessities of a people who have been impoverished that we might be rich." (p. 401.)

"The following are the railroads which pass through Indian reservations, and by which the interests of the Indians are, or may be, affected. * * *

"ATLANTIC AND PACIFIC RAILROAD, * * * [pp. 463, 465.]

"* * * In passing from the point on the Canadian River determined by this company, to Albuquerque, the former railroad would pass through the reservation of the Kiowas and Comanches, established for these Indians under the provisions of the treaty of October 21, 1867, and, in passing from Albuquerque to California, would pass near the reservation of the Navajoes, which is in Arizona and New Mexico, estab-

lished by the provisions of the treaty of June 1, 1868, and would probably pass through Camp Verde reservation, for the Apaches in Arizona. It is not known whether the immediate construction of this road is being proceeded with or not. The present attitude of some of the Indians on the proposed line of the same is not very favorable for peaceable operations. At the same time the Government can in no way better straighten itself in its attitude toward the Indians than by favoring and forwarding the railroad by all reasonable and proper means, certainly, at the least, by strong and sufficient escorts and garrisons to enable the road to go on as rapidly as its finances will allow. The position of the Government toward the Kiowas and Comanches and the Apaches, and the steps proposed to be taken with them in case of further hostilities, have been elsewhere freely spoken of. As previously stated, the number of Indians between this proposed route and the Union and Central Pacific Railroads on the north is 61,000, and the number between the road and Mexico on the south, 85,000." (p. 468.)

Attached to the report of the Commissioner of Indian Affairs is a complete account of General Howard's missions to Arizona in 1872, the object being to require Indians, if they would not peaceably submit, to go upon reservations, to remove them from the path of white settlers. General Grant's letter of March 6, 1872, to General Schofield, Commanding Military Division of the Pacific, at page 545, is a sufficient reflection of policy:

> "Indians who will not put themselves under the restraints required will have to be forced, even to the extent of making war upon them, to submit to measures that will insure security to the white settlers of the Territories.
>
> "It is not proposed that all the protection shall be to the Indians, but that, if they will submit to rules and limitations laid down for them, protection by military force shall be mutual."

General Howard summarily created and abolished In-

dian reservations (see, for example, his order of May 26, 1872, reported at p. 556, abolishing Camp Grant Indian Reservation, extending the White Mountain Reservation; his order of October 16, 1872, reducing the White Mountain Reservation, abolishing McDowell, Date Creek, and Beale Springs Reservations, and ordering Superintendent of Indian Affairs to "consult the Indians and take them to other reservations." p. 562).

The Secretary of the Interior had no difficulties in generalizing the policy. His report, which is the covering report transmitting to the President the report of the Commissioner of Indian Affairs, and which were together quoted by the President to Congress, contains the following:

> "• • • We are assuming, and I think with propriety, that our civilization ought to take the place of their barbarous habits. We therefore claim the right to control the soil which they occupy, and we assume that it is our duty to coerce them, if necessary, into the adoption and practice of our habits and customs. In doing this, it seems to me that humanity and justice, as well as honor and dignity, demand that our conduct should be characterized, so far as practicable, by forbearance and uniform kindness of treatment.
>
> "• • • The reservation system withdraws the great body of the Indians from the direct path of our industrial progress, and allows the work of settlement and the extension of our railways to go forward up to the full limit of the capacities of capital and immigration, with absolutely no check or diminution on account of Indian hostility, actual or apprehended. There is not a mile of railway which has authority of law for its construction, and for which the capital stands ready, which is unbuilt today by reason of danger from Indian attack." (p. 4.)
>
> "The military occupancy of posts adjacent to the Indian country has not been withdrawn, and should not be so long as there is the slightest danger of Indian incursions upon the settlements, or attempts to prevent the extension of new settlements in all legitimate

directions. A show of strength will be needed for some time to enforce the new policy.

"The policy of confining the wild tribes to smaller reservations is regarded as of the utmost importance; and carried forward to its full extent, will result in restricting them to an area of sufficient extent to furnish them farms for cultivation, and no more. The rapid disappearance of game from the former hunting-grounds must operate largely in favor of our efforts to confine the Indians to smaller areas, and compel them to abandon their nomadic customs, and establish themselves in permanent homes. So long as the game existed in abundance there was little disposition manifested to abandon the chase, even though Government bounty was dispensed in great abundance, affording them ample means of support. When the game shall have disappeared, we shall be well forward in the work in hand" (pp. 5-6).

"The duty of the nation toward the original occupants of the soil, who have become the wards of the nation by the fortunes of conquest and territorial acquisition, seems to me plainly marked out. The Executive is endeavoring in good faith, and in what is deemed the most proper and efficient manner, to fulfill the nation's duty toward a helpless and benighted race. He has sought to combine influences which may affect their physical and moral elevation and improvement. The missionary authorities have an entire race placed under their control, to treat with in accordance with the teachings of our higher Christian civilization" (p. 9).

LETTER FROM CHARLES D. POSTON TO GEORGE D. LEIHY.

"Thirty-Eighth Congress
House of Representatives.

United States of America.
69 Broadway, 12 April, 1865.

Mr. Geo. W. Leihy,
San Francisco.

MY DEAR SIR:

I remitted you by last steamer a letter from the Com'r of Indian Affairs with a hurried note from myself.

The Com'r requested me to give you such instruction as would enable you to enter upon your duties; but from your understanding of the circumstances of the country this will be scarcely necessary.

The object in securing your appointment as my successor was to have the ideas which we have canvassed carried out, *i. e.*, to colonize the friendly Indians on the Colorado and leave the Apaches and wild tribes to the tender mercies of the Military Authorities and the frontiersmen.

The Apaches richly deserve extermination and I hope the last one of them will be killed, and I have no objection to seeing them burnt, alive, men, women and children.

As a Christian nation it is our duty to separate the wheat from the chaff but not less a duty to punish the guilty.

It will not be possible to carry out my ideas without the corresponding means applied for but not obtained. You will admit that a very creditable effort was made but the whole bill was lost including about seven millions.

There is a small amount of goods shipped to Wm. I. Coleman & Co. bought against my consent and before my arrival—Never allow yourself to make a requi-

sition for goods. Let all your requisitions be for money. The articles needed by the Indians are few and simple—seed corn, hoes, axes, etc. etc. are all they need at present.

If we can hereafter get an appropriation of $150,000 it will do to begin the reservation as projected and set forth in my speech. The Reservation was made as laid off and no power short of Congress can change it, so the Indians may as well commence settling within the Reservation as no other arrangement will be made for them.

The appropriation for this year was $20,000. Twenty Thousand Dollars which will be placed in your hands as soon as your bond is received.

You will only be held accountable for what comes to your hands from the Government and not for what comes through me or the old wrecks. I have to account for all that as best I can. Collect the balance due from C. Behreng. White & Noyes account is all settled by me. They will receive the balance by next mail. Wm. R. Murray gets $800 for the Weaverville people same way.

Now, my dear Leihy, do the best you can and always do what is right.

Your friend,
CHARLES D. POSTON."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 23

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA,

Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF—PART 2. AN ANALYSIS OF THE LAWS OF SPAIN AND MEXICO.

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RESPONDENT'S BRIEF, Part 2.

AN ANALYSIS OF THE LAWS OF SPAIN AND MEXICO.

Petitioner first contends that the status of the Indians—specifically the Walapai Indians—on whose behalf it appears, may be determined without reference to the status of this tribe under the laws of Spain or Mexico. Respondent, as its brief amply shows, has no objection whatever to arguing this case exclusively as a matter of law under the statutes of the United States.

It is clear, however, that the Treaty of Guadalupe Hidalgo did reflect the intention of the United States

* Herein spelled "Walapai".

Government to accord rights to the inhabitants of the ceded territory such as they had enjoyed under Spanish and Mexican law.

Obviously, it is important to determine what those rights were, as bearing on the intent of Congress in various acts which were enacted by it and as shedding light on the administration of those acts by the Executive department of our Government. Respondent's contention is that the Walapai Indians had no possessory or demesne rights in the lands on which they were found at the date of the treaty, and that accordingly if they were to acquire any such rights they would have to be derived in some fashion from the United States. The United States made inquiry to ascertain what, if any, rights the Indians such as the Walapai had at the date of the treaty, and thereafter proceeded on the assumption that no rights existed. The foregoing has been demonstrated in Respondent's brief; and it welcomes the opportunity of discussing what in fact were the rights of Indians such as the Walapai under the laws of Spain and Mexico. We are gratified that, despite Petitioner's contention of its irrelevance, they discuss the pre-treaty status of the Walapai, and that whatever arguments can be advanced against Respondent's position are fully and ably presented.

Petitioner's arguments on this matter are contained in pp. 61-79 of its brief. They may be said to consist of the following material:

1. Copious quotations from the work of Franciscus de Victoria (or Vitoria, in Spanish) recently more fully recognized than he had been before as one of the founders of modern International Law. These are found on pp. 61-67.

2. Reference to paragraphs in the *Recopilacion de Leyes de Las Indias*, pp. 67-68.

3. Reference to special dealings with certain Indians by the Spanish Crown, p. 71.

4. A brief statement as to the continuity of Mexican and Spanish law, p. 76.

It would be sufficient to say in relation to these arguments of Petitioner that no one of them directly relates to the only point involved, and that is the question of whether the fact of occupancy of a large tract of land, by a tribe regarded as savage, constituted at Spanish and Mexican law anything remotely approaching a title or constituted any sort of ownership or invested the tribe as such with any rights as to the land over which its members roamed.

Petitioner's arguments do not deal at all with the many citations of specific authority contained in previous briefs of Respondent of which the most important are the passages from Wistana Orozco's book on Domain lands (Tierras baldios), *Legislacion y Jurisprudencia sobre Tierras Baldios*, 2, p. 765, referring to the roval cedula of November 10, 1591.

> "The royal cedula cited established the legal principle that all the conquered lands belonged in full dominion to the royal crown of Spain,—an arbitrary disposal which deprived, with the solemnity of a royal decree, the ancient inhabitants of the country of the legitimate property rights and titles they enjoyed over the soil."

We may add further the passage of the same book, pp. 87-95, which established that all the lands not specifically granted to persons capable of holding them were in the Crown and, after Mexican independence, in the Republic of Mexico.

While, therefore, Petitioner's citations in this matter are irrelevant, since they do not deal with the real issue, Respondent is fully ready to answer the contentions for whatever value they have:

The citations from the works of de Victoria demonstrate that in the opinion of this lofty-minded and humane theologian, infidels and savages were human beings and had all the human and personal rights of all human beings. This was at the time a matter of utmost theoretical interest

since it was actually contended by some writers of the early sixteenth century that the Indians of the New World were not, properly speaking, human beings or capable of entering the Christian communion. Others who did not go so far declared, with large citations of authority from the Bible and classical authors, that while capable of receiving Christian baptism, the Indians were designed for perpetual slavery.

De Victoria took a strong stand against both these contentions and thereby deserves the glowing eulogies that have been bestowed upon him by modern writers. His point of view is much more humane than that of Edward Coke, as set forth in *Calvin's Case*, 7 Coke 17b, 77 E. R. 398. It should, however, be added that Coke's brutal doctrine was not accepted by later common lawyers and that it was formally declared to be a principle of the common law, as de Victoria declared it of the law of nature, that Indians were not as such deprived of personal rights. Cf. 1 Blackstone's Commentaries No. 107; and 2 P. Wms. 75, 24 E. Rep. 674.

But the entire contention of de Victoria, based on the law of nature, merely goes to the question of the personal rights of the Indians as human beings. They are not to be enslaved, not to be killed, not to be injured in body or in personal relations. And whatever property they *lawfully* have may not be taken from them except—one is almost tempted to say—by due process of law. The issue, however, of the property rights of savages lay in just this: What property is *lawfully* theirs?

Petitioner's point would have relevancy only if it had been contended by Respondent that Indians under Spanish law were persons devoid of rights of any description, or that no Indian or group of Indians could ever acquire ownership in land or legally protected rights in land. It is only such a statement that would be contrary to the

position of de Victoria. (But Respondent at no time made any such statement, and makes no such statement now.)

On the contrary, it is a point of Respondent's case that individual Indians and organized pueblo-communities could and did own land in the only way in which ownership could be acquired in New Spain—which includes Mexico—and that was by grant of the King or by charter or cedula confirming rights claimed before.

Petitioner at no stage in this protracted litigation has been able to point to a single document in which the Walapai Indians had been confirmed in the ownership or owner-like control of the lands in controversy. Nor have counsel been able to point to a single public declaration of any Spanish authority recognizing in blanket form such property rights in Indian tribes in general.

Petitioner does indeed cite on p. 71 of its brief, a treaty made by the Crown of Spain in 1784 with the Tallapuche Indians, for which it cites as authority 2 *White's New Recopilacion*, pp. 318, 321. But it omits to mention several things that are of the utmost importance.

The Tallapuche Indians were in Florida and not in New Spain. They had never been conquered. They were an organized and settled tribe. The treaty in question first brought them under the jurisdiction of the Spanish Crown and on the terms there given. If a similar treaty could be found with the Walapai that would have some relevancy. But the Tallapuche treaty clearly cannot be relevant to the issue, except to confirm, what no one questions, that Indians under the Crown might own land, if they showed a title to it by grant or, as in this case, by formal recognition in a treaty.

The primary contention of Respondent (which even the passages cited by Petitioner admit by implication) is that all the soil of New Spain became the property of the Crown. This was based only to a very minor degree on the famous

papal bull of Alexander VI. The legal position was that it was based on conquest. No one questioned—not even humanitarian theologians like de Victoria—that conquest was an adequate basis of title.

The title of the Kings of Spain is fully examined in Chapter XII of the sixth book of Solorzano already quoted, in which the unqualified ownership of the crown in all land that has not been specifically transferred to persons natural or corporate is given complete expression.

I should like particularly to call attention to section 3 of this chapter which follows:

> "3. Y recogiéndome Yo á lo que toca á la de las Indias, hallo, que esta misma Regalia tienen nuestros gloriosos Reyes an ellas, en tal forma, que fuera de las tierras, prados, pastos, montes y aguas, que por particular gracia y merced suya se hallaren concedidas á las Ciudades, Villas ó Lugares de las mismas Indias, ó á otras Comunidades ó personas particulares de ellas, todo lo demás de este género y especialmente lo que estuviere por romper y cultivar, es y debe ser de su Real Corona y dominio."—De Solorzano, *Politica Indiana*, L. VI., Chap. XII, Sec. 3.

[Translation]

> 3. And turning to that which touches the affairs of the Indies, I find that many of our glorious Kings hold (these royal rights) in them, in this way that outside of the lands, fields, pastures, mountains and waters which only of his particular grace and charity are found granted to Cities, Towns, or Localities of the same Indies or to other Communities or particular persons of them, all the rest of this kind and especially that which can be ploughed and cultivated is and ought to belong to His Royal Crown and Dominion.

This right of the Spanish sovereign in the land was often expressed by the very terms of the grants. And that the disposition of lands in New Spain frequently involved the removal of Indians, their resettlement, their formal deprivation, is shown by the situations expressed and implied

in nearly all the grants of large territories by the Spanish Crown; and as has been said, there was nothing to prevent these grants from being made to Indians as well as Spaniards and to organized Indian pueblos.

The property therefore which is meant in the paragraphs from the *Recopilacion de Leyes de Las Indias*, on pp. 67-68 of the Petitioner's brief is land which "of right belongs" to Indians, in the sense that they can show a lawful title to it emanating from the Spanish Crown. Individual Indians and pueblos may not be dispossessed of land which they have lawfully obtained. The Indians mentioned are Indians living in the midst of Spanish colonists, and they are to be protected from private greed and from the incompetence or corruption of royal officials. The *leyes* of the Recopilacion are specifically addressed, it will be noted to governors and administrators.

And it is further clear that no prescriptive title in the lands occupied by the Walapai Indians or by similar groups, could be urged against the Crown. To be effective, prescriptive rights in Spanish law were predicated on a *justus titulus*, that is on a lawful and formally correct form of acquisition. No such *justus titulus* could possibly be found for the ranging of a wandering tribe over territory neither defined by limits nor otherwise clearly identifiable.

What is said in Petitioner's brief on the Spanish law of prescription (p. 70, Note 67) is undoubted law. Indeed, it is an essential part of Respondent's case. If the Walapai had been, as is stated in that note, "a city, town or village or a similarly recognized community" and if the Laws of Toro (B. 10, Title 17, Law 1) were complied with, then the Walapai might have required "civil and criminal jurisdiction" as is provided in a paragraph of the *Novisimo Recopilacion*.

But that the Walapai were such an organized community

is not alleged even by Petitioner and is obviously not true; and that the Laws of Toro had been complied with is not even remotely suggested. Petitioner does not tell us what these Laws of Toro demand. We should like to supply the omission by noting that these laws, like all Spanish laws on the subject, require a "*justus titulus*", a formally correct form of acquisition (wholly lacking here) and good faith.

So far as the second paragraph of the above-cited note is concerned, this, as is stated, refers to the *mayorazgo*, which is translated as "inheritance". The word, however, does not mean inheritance but an institution like the fee-tail, the Roman *familiare fidei-commissum*. It need hardly be pointed out that the Walapai did not enjoy a "fee-tail" in their lands, a form meaningless except for individual families and created by an elaborate system of documents. Incidentally, all *mayorazgos* were abolished in Mexico as soon as independence was established.

But we are not reduced to merely negative arguments. In the *Recopilacion de Leyes de Las Indias*, (Lib. 4, Tit. 15, Ley 2) it is expressly provided that permissive user, even of determined and limited land, and *a fortiori* of vague territories, would establish no prescription. There can be no prescription, it is declared of lands held, *por toleracion ej sin titula valido*, i. e. "by sufferance and without a formally valid claim of ownership." The best that can be said about the Walapai Indians is that they were not ejected from the lands over which they roamed. Nothing could be less suited to satisfy the requirements of prescription, to which fact Petitioner's brief itself calls our attention.

It may further be noted as a curious fact that the case of Petitioner is made to rest on a prescriptive title against the state when the weight of its argument has always been that Respondent could not get a prescriptive title against the state, in spite of user, long occupancy, payment of taxes

and other special assessments and confirmation by Executive order and legislative enactment.

De Victoria was a saintly and learned man. He was not, however, a legal authority so far as Spanish courts and administrators were concerned. If the generalizations quoted on pp. 63-67 were to be heard as a basis of legal claims, they would refute themselves as wholly unrealistic. If his "conclusion", cited on p. 66 of Petitioner's brief with apparent approval, that "at the time of the Spaniards' first voyages to America, they took with them no right to occupy the lands of the indigenous population" really expressed the law of Spain, as Petitioner wishes to understand it, it could only follow that neither the Spanish Crown nor the Republic of Mexico ever had the ownership of these lands or had the power to cede them by treaty to the United States.

This *reductio ad absurdum*, however, merely suggests—and the entire book of de Victoria confirms this—that what he was speaking of is the right of the Indians *before* the conquest. Once the conquest was completed the "conclusion" cited is clearly without bearing on the rights of the Crown or of others to the lands of New Spain.

De Victoria contented himself with general and broad exposition of principles. A much more definitely legal authority for our purposes was the great jurist of the next generation, Diego Covarrubias, whose collected works were the constant books of reference of Spanish lawyers. Covarrubias, more realistically if less humanely, expressed the accepted doctrine that "pagans" had no real rights in property. In *Opera Omnia* (1679) I, 679.2 he says:

> "Unbelievers so long as they are unbelievers, possess their property only at the will of Christian sovereigns and therefore may be deprived of their property."

But all these generalizations are of less authority for our purpose than the presentation of the law of Spain in

this matter by Juan de Solorzano-Pereira, a member of the Royal Council whose book *De Indiarum Gubernatione*, published in the sixteenth century, remained a permanent manual of Spanish administration.

The Spanish translation was called *Politica Indiana*. The standard edition was published in 1647 but has been frequently reprinted, most recently in 1940. The Latin version will be referred to later.

Solorzano traces the title of the Spanish crown in part from the Bull of Alexander VI, which he discusses in detail in the first book of his work. His position on the rights of savages and infidels is stated in the passage that immediately follows:

> "9. Antonio Scapo es del mismo sentir: porque haviendo dicho primero, que la jurisdiccion, y dominio de las tierras, y de otras cosas por derecho Divino, y natural de las gentes igualmente compete á Infieles, y á Fieles; punto en que convienen otros muchos Autores. Luego siguiendo á Ostiense, Oldraldo, y otros que refiere, añade, qua despues de la venida de Christo todo esto se mudó, y traslado á la Iglesia de tal suerte que los Infieles oy, de qualquier condicion que sean, ni tienen, ni pueden tener jurisdiccion, dominio, honores, ni potestades: y que de todo esto pueden justa, y licitamente ser despojados sino reconocen el dominio de la Iglesia."—De Solorzano, *Politica Indiana*, L. I., Chap. X, Sec. 9.

[Translation]

> Antonio Scapo is of the same opinion (viz. that pagans are subject to the Church); because having first said that the jurisdiction and ownership of lands and other things belongs by divine law and by natural law of human beings equally to Unbelievers and Believers, a point on which many other authors agree. Then following Ostiense, Olarado and others whom he cites, he adds that since the coming of Christ all this changed and was transferred to the church in such a way that the Unbelievers of today of whatever condition they are, neither hold nor can hold Jurisdiction title, honors

nor powers and of all this they can be justly and lawfully deprived unless they recognize the title of the Church.

Solorzano repeats all the generalizations of the great theologians on the rights of Indians to person and property as human beings, and the background he has in mind is clearly that presented by Indians living as fellow-denizens of occupied lands with Spaniards or as slaves or servants of Spaniards. What his highly authoritative judgment was on the status of Indians like those of the Walapai, may be seen from two passages. We quote from the edition of 1777, Vol. 2, p. 10:

"Quamvis nulla possessio ab Hispanis praetexerent, solebant tamen judices Indos quos vagos et incertae sedis seu soli comperiebant, sub certis legibus et conditionibus in perpetuum concedere et assignare."

"Even when no possession by Spaniards is alleged, the judges are accustomed to grant and assign (in serfdom) those Indians whom they have found to be wandering, of uncertain abode and local habitation, under fixed terms and conditions."

But more especially we call attention to the passage, (Op. cit. I, p. 197):

"Indos omnino feros sylvestres et per campos palantes oberrantes—procedi posse arbiter ut per vim capi, domari et in servitutem redigi possent."

"The Indians who are altogether savage and denizens of the forest, who wander to and fro through the open country, may in my opinion be dealt with so that they may be forcibly taken, subjugated and reduced into slavery."

Nothing need be added to this statement. That the Walapai were a "savage" tribe, that they wandered about over the open country, throughout Spanish and Mexican times, is undeniable. That, according to Solorzano, they had no rights which could be urged against the Crown or its officers, and that they were not even included in the general

protection of Indians who lived peaceful lives in fixed places, is clearly established.

We may say, therefore, that both negatively and affirmatively Petitioner has failed in any way to impair the validity of Respondent's contention that neither the Walapai Indians nor any aggregation of Indians like them, had in any degree the remotest sort of a title to the lands on which they lived under the Spanish crown. They could be taken individually or collectively, sold as slaves or transferred as serfs, and removed from the place in which they were found.

Petitioner has failed to cite a single instance in which loose tribal aggregations like these were treated otherwise under Spanish law. They have contented themselves with reassertions of the undisputed proposition that Indians as such were not outlawed by Spain, that they might acquire property, and that Spanish officials were strictly ordered to protect them. But it is not Indians as such whose lands are in question, but a definite kind of Indians, savage Indians, "denizens of forests". It is these Indians, who, it is submitted, had no right and could have no right while in that status under Spanish and Mexican law to a general or a special property over the territories they inhabited no matter how long they had wandered over it.

Petitioner has dealt rather lightly with the condition of the Indians between the establishment of Mexican independence and the Treaty of Guadalupe Hidalgo, a period of about thirty years. The brief merely refers to the "Plan of Iguala", (p. 77, Note 73) under which "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians are citizens of this monarchy"—a plan was incorporated into the Mexican Declaration of Independence of Oct. 6, 1821.

This is undisputed and it will be readily conceded by Respondent that any whites or Africans who wandered

about as savages in Mexican territory would be dealt with just as Indians would be.

As an example of the Mexican attitude in this matter it may be well to cite a Circular of the Ministerio de Formento, of September 14, 1866. Although later in date than the treaty of Guadalupe Hidalgo it was prepared at a time when Indian claims were more tenderly treated than they had ever been before.

It states:

> "In all titles to property of public lands care is taken to say that they are granted without prejudice to the rights of third persons, and although *such a prejudice strictly does not exist in respect to lands of which native Indians are in possession, when they lack a title granted by competent authority,* the rule has arisen to avoid dispossessing them."

It is clear that this is both a statement of law and of practical policy. So far as the law is concerned, the italicized sentence indicates what the law was in 1866 and a fortiori in 1848. The fact of possession by an Indian tribe was no basis of a title.

Respectfully submitted,

MAX RADIN,
Attorney for Respondent.

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SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION,
Respondent.

SUPPLEMENT TO APPENDIX TO RESPONDENT'S BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondent.

SUPPLEMENT TO APPENDIX TO RESPONDENT'S BRIEF.

I. Extract from Report on the Subject of Land Titles in California.

(MADE IN PURSUANCE OF INSTRUCTIONS FROM THE SECRETARY OF STATE AND THE SECRETARY OF THE INTERIOR, BY WILLIAM CAREY JONES)

(Senate Ex. Doc. 18, 31st Cong., 2d Sess., Cong. Doc Series 589)

I am also instructed to make "an inquiry into the nature of the *Indian rights* (in the soil) under the Spanish and Mexican governments."

It is a principle constantly laid down in the Spanish colonial laws, that the Indians shall have a *right* to as much land as they need for their habitations, for tillage, and for the pasturage of their flocks. When they were already partially settled in communities, sufficient of the land which they occupied was secured them for those purposes. If they were wild and scattered in the mountains and wildernesses, the policy of the law, and the instructions impressed on the authorities of the distant provinces, was to reduce them, establish them in villages, convert them to Christianity, and instruct them in useful employment. California was not excepted from the operations of this rule. It was for this purpose especially that the missions were founded and encouraged. The instructions, heretofore quoted, given to the commandant of Upper California in August, 1773, enjoin on that functionary that "the reduction of the Indians in population as the spiritual conquests advance, shall be one of his principal cares;" that, the reduction made, "and as rapidly as it proceeds, it is important for their preservation and augmentation to congregate them in mission settlements, in order that they may be civilized and led to a rational life; which (adds the instructions) is impossible if they be left to live dispersed in the mountains" (p. 32).

* * * * * * * * * *

In the wild or wandering tribes, the Spanish law does not recognise any title whatever to the soil (p. 34).

(This report was submitted to the Congress by the Secretary of the Interior on April 22, 1850. Sen. Ex. Doc. 18, 31st Cong., 2d Sess., p. 1.)

Note.—In House Ex. Doc. 17 of the 31st Cong., 1st Sess., Cong. Doc. Series 573, are contained documents showing the selection of William Carey Jones "as a lawyer well skilled in the Spanish colonial titles" by the Secretary of the Interior and the Secretary of State for the purpose of obtaining reliable information as to the condition of land titles in California, to enable the Secretary of the Interior

to submit a report thereon to the Congress at its next session. At the request of the Secretary of the Interior, the Commissioner of the General Land Office instructed Mr. Jones as to the matters to be considered by him. He was not only to investigate the condition of titles based on grants from the Spanish and Mexican governments but was also to inquire into the nature of "Indian rights" as they existed under the Spanish and Mexican governments. See pages 112-115.

II. Memorial from the Territorial Legislature of Arizona, Dated November 7, 1864, Appearing in the Congressional Globe for March 2, 1865, 38th Congress, 2d Session, page 1320.

To the Senate and House of Representatives of the United States in Congress assembled:

Your memorialists, the Council and House of Representatives of the Legislative Assembly of the Territory of Arizona respectfully represent, that the four tribes of Indians known as the Yapapais, Hualapais, Mojaves, and Yumas, numbering about ten thousand, are now scattered over an extent of country from the Gila river on the south to the northern boundary of the Territory, and from the Colorado river on the west to the Rio Verde on the east; that these Indians are now roaming at large over the vast territory above described, gaining a precarious subsistence from the small patches of land along the Colorado river, which they cultivate, and from fishing and hunting; that when the seasons are unfavorable to their little farming interests, or the Colorado river does not overflow to irrigate and enrich their fields, they are reduced to a starving condition, and compelled, by necessity, to make raids upon the stock and property of the whites, and not unfrequently do they ambush the traveler and miner, and waylay and stampede the stock of trains and plunder their packs and wagons; that the whites are settling up the country, and necessarily diminishing their means of subsistence, and increasing the dangers of a collision with them; that the late superintendent of Indian

affairs of the Territory, Hon. Charles D. Poston, in view of their scattered and destitute condition, selected and caused to be laid off, on the east bank and bottom of the Colorado river, a reservation ample enough for the accommodation and support of all the above-named tribes; that an irrigating canal can be constructed at an expense of a small amount (the Indians performing the labor) that will render highly productive a large tract of land that will yield an abundance for their support, and afford a large surplus to be disposed of for their education and improvement; that when placed upon said reservation they can, under judicious management, be made not only self-sustaining, but to produce largely for the market; that, to enable those who may be placed over them or have charge of them to open said canal, to remove them upon said reservation, and sustain them until they can, by their own labor, provide enough for their subsistence, your memorialists respectfully ask of your honorable body an appropriation of $150,000; that to secure the attention and favorable consideration of the subject and matters of this memorial by the Congress of the United States,

Be it resolved by the Legislative Assembly of the Territory of Arizona, That our Delegate in Congress, Hon. Charles D. Poston, be requested to use all honorable means to bring the subject before Congress.

And be it further resolved, That his Excellency the Governor of the Territory of Arizona be requested to forward this memorial, together with such other information touching the subject as he may have in his possession, to Hon. Charles D. Poston, our Delegate in Congress.

W. Claude Jones,
Speaker of the House of Representatives.

Coles Bashford,
President of the Council.

Approved November 7, 1864.

John M. Goodwin.

III. Letters Showing Administration of the Act of 1866.

. . . . . .

"Department of the Interior,
"General Land Office,
Washington, D. C., May 17th, 1872.

"Register and receiver, Prescott, Arizona, T'y.

"Gentlemen: I transmit herewith a diagram showing the location of the Atlantic and Pacific railroad through the Territory of Arizona, from the eastern to the western boundaries, showing also the forty and fifty mile limits of the land grant thereto, under act of Congress approved July 27, 1866; and you are hereby directed to withhold from pre-emption or homestead entry, private sale or location, all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road was designated by filing a plat thereof in this office, which was March 12th, 1872. The even-numbered sections within the forty-mile limits you will increase in price to $2.50 per acre, and dispose of them at that price, and under the pre-emption and homestead laws only. The even sections outside of the forty-mile limits are not affected by this withdrawal, nor are the claims of pre-emption settlers initiated prior to the right of the road attaching, March 12, 1872, affected by it.

"You will please acknowledge the receipt of this letter without delay.

"Very respectfully,

"WILLIS DRUMMOND,
"*Commissioner.*"

Record
(Page 38 of Record, *Atlantic and Pacific Rr. Co.* v. *Mingus*, 165 U. S. 413—)

"Department of the Interior,
"General Land Office,
"Washington, D. C., Feb. 23d, 1881.

"E. F. Winslow, Esq., vice-president Atlantic and Pacific Railroad Company, Drexel building, cor. Wall and Broad streets, New York city.

"Sir: I am in receipt of your letter of 15th instant, stating that your financial agents, Messrs. Seligman and Co., desire 'an official statement of the number of acres of land to which the Atlantic and Pacific Railroad Company will be entitled upon completion of its road from the west boundary line of Missouri to San Francisco.'

* * * * * * * * * * *

"From the west line of Texas the main line, as located, runs through the Territory of New Mexico, about 416 miles, to the east line of Arizona Territory, and thence through Arizona, about 380 miles, to the west line thereof.

"Through these Territories the amount of the grant is about 20,377,600 acres. The land is for the greater part unsurveyed, and I see no reason why, out of the land reserved for the grant, the same may not be entirely satisfied as to this part of the line and yet have a very large quantity in the 'i-demnity' limits applicable to losses elsewhere.

"Very respectfully,

"J. A. Williamson,
"*Commissioner.*"

(At pages 86 to 89 of the Mingus record above cited)

IV. Legislative Background of the Act of 1904 (33 Stat. 189, 211), Permitting Exchanges of Private Land Within Indian Reservations (for text see Appendix, p. 62).

Senate Report No. 806, 58th Congress, 2d Session.

TITLE TO LANDS IN CERTAIN INDIAN RESERVATIONS.

The Committee on Indian Affairs submitted the following report to accompany S. 3205, authorizing the Secretary of the Interior to acquire the title to lands within certain Indian reservations:

This bill was taken from a letter signed by the Commissioner of Indian Affairs and the Secretary of the Interior, dated January 12, 1903 . . . As stated in that letter in the Territories of Arizona and New Mexico there are Indian reservations in which the alternate even-numbered sections are owned by the Government, and the alternate odd-numbered sections are held in private ownership under the Atlantic & Pacific Railroad land grant. This situation is peculiar to certain reservations in Arizona and New Mexico and arises from the fact that after the definite location of the line of the Atlantic & Pacific Railroad, and therefore after the right of the railroad company to alternate odd-numbered sections had become vested and had passed beyond the control of the legislative or executive branch of the Government, certain Indian reservations were established within the limits of this railroad land grant, and certain other existing reservations were enlarged so as to include lands within the limits of this grant.

This resulted in a divided ownership, and a divided authority within the limits of these Indian reservations. This is destructive of the authority of the United States within the reservations, and is alike injurious to the Indians and other owners of the rail oad lands. It works a serious injustice to those holding the railroad title, because while compelled to pay county and Territorial taxes upon their alternate odd-numbered sections, they are unable to use them without coming in conflict with the Government's authority over and the Indians' use of the alternate even-numbered sections. It is especially desirable that this situation be changed. The Government, the Indians, and the owners of these private lands will be mutually benefited thereby.

The bill contains safeguards which amply protect the Government and the Indians and effectually preclude injury to the individuals. Exchange is not compulsory on the Government, and can be made only where it is deemed advisable by the Secretary of the Interior. Equality in advantages resulting from exchange is assured. No exchange can be made which increases the acreage of any private owner or diminishes that of the Government or which changes the character or value of the lands held in public or in private ownership, or by which the Government surrenders any mineral or timber lands. No roaming right of lieu selection is given, and no land scrip can be issued. The lands to be given in exchange by the Government are confined to surveyed public lands in the same territory, and the authorization extends only to obtaining full governmental ownership of all the lands within these Indian reservations.

Letters from the honorable Secretary of the Interior and the Commissioner of Indian Affairs are appended hereto and made a part of this report.

Department of the Interior
Washington, January 21, 1904

Sir:

I have the honor to acknowledge the receipt by your reference of the 12th instant, of S. 3205 . . .

The object of this bill is to authorize the exchange of vacant public lands in Arizona and New Mexico, nor mineral nor timbered, for private lands within the land grant to the Atlantic & Pacific Railroad Company of like area and value and located within Indian reservations in said Territories.

Legislation as contained in this act was recommended by the department, January 12, 1903, in a letter addressed to the Chairman of the Committee on Indian Affairs, House of Representatives, a copy of which is enclosed for your information.

I transmit herewith copy of Indian Office report on this bill, and recommend that the bill be enacted into law.

Very respectfully,

E. A. Hitchcock,
Secretary.

The Chairman Committee on Indian Affairs,
United States Senate

Department of Interior, Office of Indian Affairs, Washington, January 20, 1904

Sir:

• • • The object of the bill is to authorize the Secretary of the Interior, in his discretion, to exchange surveyed public lands in the Territories of New Mexico and Arizona which are vacant, unappropriated, not mineral, and not timbered, for private lands included within the grant to the Atlantic & Pacific Railroad Company of like area and value and located within Indian reservations in said Territories, thereby obtaining for governmental ownership all the lands within such Indian reservation.

Section 2 of the act provides that the railroad company or its grantee must, at its expense and by appropriate instruments of conveyance, surrender to the Government the full and unencumbered right and title to the private lands included in any exchange before patents are issued for the public lands included therein, and that no charge of any kind shall be made for issuing such patents.

This section further provides that upon the completion of any exchange the lands surrendered to the Government thereunder shall become part of the Indian reservation within the limits of which they are situate, and that nothing contained in said bill shall in any manner be so construed as to authorize the issuance of any land scrip or to enlarge the quantity of land to which said railroad company or any of its grantees may be entitled under existing law.

This bill is evidently taken from office letter of January 12, 1903, to which is attached your signature, addressed to the Chairman of the Committee on Indian Affairs, House of Representatives, in which it was recommended that certain provisions should be inserted in the Indian appropriation bill then pending, or that such provisions be made the subject of an independent bill as might be deemed most advisable, for the relieving of the situation resulting from such joint ownership of the lands included within these Indian reservations. It was stated at that time that the provisions suggested, which are incorporated in the bill herewith, would meet the existing situation and contained safeguards which amply protected the Government, and the Indians, and effectually precluded injury to the individuals.

There has been no change in the conditions existing at the date of my letter of January 12, 1903, and I therefore recommend that the bill herewith be enacted into law.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

The Secretary of the Interior

Department of the Interior,
Washington, January 12, 1903

Sir:

Recently you informally called to the attention of the Commissioner of Indian Affairs the fact that in the Territories of Arizona and New Mexico there are Indian reservations in which the alternate even-numbered sections are owned by the Government and the alternate odd-numbered sections are held in private ownership under the Atlantic & Pacific Railroad land grant. This situation is indeed an unfortunate one, and is peculiar to certain reservations in Arizona and New Mexico. It arises from the fact that after the definite location of the line of the Atlantic & Pacific, and therefore, after the right of the railroad company to the alternate odd-numbered sections had become vested and had passed beyond the controls of the legislative or executive branch of the Government, certain Indian reservations were established within the limits of this railroad land grant, and certain other existing reservations were enlarged so as to include lands within the limits of said grant.

The result is that there is a divided ownership and a divided authority within the limits of these Indian reservations. This is destructive of the authority of the United States within the reservations, and is alike injurious to the Indians and other owners of the railroad lands. It works a serious injustice to those holding the railroad title, because, while compelled to pay county and Territorial taxes upon their alternate odd-numbered sections, they are unable to use them without coming in conflict with the Government's authority over and the Indians' use of the alternate even-numbered sections. It is especially desirable that this situation be changed. The Government, the Indians, and the owners of these private lands will be mutually benefited thereby. We respectfully recommend that the following provision for relieving this situation be inserted in the pending Indian appropriation bill, or be made

the subject of an independent bill, as may be deemed most advisable.

Wherever and to the extent that any of the lands within the place limits of the land grants to the Atlantic & Pacific Railroad Company within the Territories of Arizona and New Mexico were placed within any Indian reservation after the dates when the right of the Railroad Company had attached by the definite location of its line of railroad opposite thereto, and are still embraced within such Indian reservation, the Secretary of the Interior shall be duly authorized, in his discretion, to exchange surveyed public lands in the same Territory which are vacant, unappropriated, not mineral, and not timbered, for private lands in such reservation of like area and value in the alternate sections granted to the railroad company, so far as may be necessary to obtain full governmental ownership of all the lands within such Indian reservation. The railroad company or its grantee must, at its expense and by appropriate instruments of conveyance, surrender to the Government the full and unencumbered right and title to the private lands included in any exchange before patents are issued for the public lands included therein, and no charge of any kind shall be made for issuing such patents. Upon the completion of any exchange, the lands surrendered to the Government thereunder shall become a part of the Indian reservation within the limit of which they are situate. Nothing herein shall in any manner be so construed as to authorize the issuance of any land scrip, or to enlarge the quantity of land to which such railroad company or any of its grantees may be entitled under existing law.

We believe this provision fully meets the existing situation and contains safeguards which amply protect the Government and the Indians and effectually preclude injury to individuals. Equality in advantages resulting from every exchange is assured. Exchange is not compulsory on the Government and can be made only where it is deemed advisable by the Secretary of the Interior. No exchange

can be made for increasing the acreage of any private owner or diminishing that of the Government, or which changes the character or value of the lands held in public or private ownership, or by which the Government surrenders any minerals or timber lands. No roaming right of lieu selection is given, and no land scrip can be issued. The lands to be given in exchange by the Government are in the same Territory, and the authorization extends only to obtaining full governmental ownership of all the lands within these Indian reservations.

We sincerely trust that the provisions here proposed will receive the favorable consideration of Congress.

Very respectfully,

W. A. JONES,
Commissioner of Indian Affairs.

E. A. HITCHCOCK,
Secretary of the Interior.

The Chairman of the Committee on Indian Affairs,
House of Representatives.

[Chicago Public Library No. 4572]

V. The Act of March 4, 1913 (37 Stat. 1007), for the Relief of Indians Occupying Railroad Lands in Arizona, New Mexico, or California (for Text See Appendix, p. 66), Statutes extending the Last-Named Act, and Pertinent Legislative History.

This Act was extended by various Acts of Congress in 1916 (39 Stat. 48), 1919 (41 Stat. 9), 1922 (42 Stat. 994), 1925 (43 Stat. 795), 1928 (45 Stat. 299). The report on which the Act of March 10, 1928, last referred to, was enacted, was Senate Report 262 of February 8, 1928, as follows:

SENATE REPORT NO. 262.

To Amend an Act Entitled "An Act for the Relief of Indians Occupying Railroad Lands in Arizona, New Mexico, or California"

February 8, 1928.—Ordered to be printed.

Mr. Frazier, from the Committee on Indian Affairs, submitted the following

Report

[To accompany S. 2154]

The Committee on Indian Affairs, to whom was referred the bill (S. 2154) to amend an act entitled "An act for the relief of Indians occupying railroad lands in Arizona, New Mexico, or California," approved March 4, 1913, having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment:

In line 8 strike out the figures "1929" and substitute in lieu thereof the figures "1931."

This bill is recommended by the department, as is shown in letter from the Acting Secretary of the Interior under date of December 29, 1927, which is attached hereto and made a part of this report.

Department of the Interior,
Washington, December 29, 1927.

"*Hon. Lynn J. Frazier,*
Chairman Committee on Indian Affairs,
United States Senate.

My Dear Senator Frazier:

The Act of March 4, 1913 (37 Stat. 1007), makes provision by which Indians who had occupied lands within railroad grants in Arizona, New Mexico, and California for a period of five years or more prior to the date of that act might receive such tracts as allotments, if they were eligible under the provisions of section 4 of the act of February 8, 1887 (24 Stat. 388), as amended; upon the acceptance by the railroad company of other land on the public domain in lieu thereof. The provisions of that act were to run for a period of three years. These provisions have been extended from time to time by subsequent acts of Congress, the last extension authorized by the act of January 29, 1925 (43 Stat. 795), expiring March 4, 1927.

It had been hoped to complete the work of exchanging public-domain lands for the benefit of Indians residing on railroad grants before the date last above mentioned, but the effort was not successful. The railroad companies seldom select lieu lands for their own use but merely sell the right of selection, and the exchanges were greatly retarded by a decrease in the demand for agricultural and grazing lands. Because of these conditions the attitude of the railroad officials concerning exchanges under the above-mentioned act has not been so liberal in the last few years as formerly. This condition has resulted in the rejection of numerous Indian allotment applications embracing railroad-grant lands during the period of extension authorized by the act of January 29, 1925, *supra*, and only one exhange was perfected during that time under the act mentioned, covering a 40-acre tract in New Mexico. Prior to that time a total of approximately 18,000 acres was exchanged for

the benefit of Indians in Arizona and New Mexico and 160 acres in California. In this connection it will be observed that the act of March 4, 1913, *supra*, is merely permissive and not mandatory, the exchanges authorized being entirely dependent upon the willingness of the railroad company to relinquish and accept other lands in lieu.

It has recently been brought to the attention of this department that a number of Walapai Indians have been for a number of years occupying and cultivating a railroad owned section in Mohave County, Ariz., about 30 miles southeast of Kingman, on which they have erected valuable improvements. Officials of the Santa Fe Pacific Railway Co. have expressed a willingness to relinquish the entire section to the United States and select other land in lieu thereof, provided the necessary authority of law is procured, in order that the Indians may obtain title to the land occupied by them and receive trust patents therefor.

The facts disclosed by correspondence on file indicate that the Indians concerned are industrious and worthy, and it is the belief of this department that an extension should be authorized for their relief and benefit. In no other way can they hope to obtain title to the lands they have occupied and improved except possible [possibly] by purchase, as to this they are not possessed of sufficient funds. The draft of a bill to authorize an extension till March 4, 1929, has been prepared and is submitted herewith.

It is respectfully recommended that the proposed bill or similar legislation receive favorable consideration by your committee and the Congress.

Very truly yours,

E. C. Finney,
Acting Secretary.

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In the Supreme Court U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 23

THE UNITED STATES OF AMERICA, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona,

Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

Brief for the State of Arizona, County of Coconino, County of Mohave and County of Yavapai, Arizona, as Amici Curiae

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STATEMENT

The controversy in this case directly involves the respective rights of the Petitioner and Respondent in lands lying entirely within the boundaries of the State of Arizona, portions of which lie within the boundaries of the respective counties of Coconino, Mohave, and Yavapai. A decision by this Court that immemorial occupancy of lands by an

Indian tribe creates, without more, a right to maintain that possession, cognizable in the courts, would have a disruptive effect upon the entire economy of the State. It is a matter of common knowledge that a large percentage of the population of the State, other than Indian, is located within the confines of the Salt River Valley. Large portions of this area were until very recent times, and some portions now are, occupied by Indian tribes, and the character of such occupancy as respects permanence and exclusiveness is at least equal to any claimed for the Walapai in this case. See 2 Hodge, *Handbook of American Indians*, Smithsonian Institution, Bureau of American Ethnology, Bulletin 30, Page 251. Any suggestion by this Court that Indian tribes might have rights in property enforcible in a court of law by the mere fact of occupancy would at least cast a cloud upon the title to the major portion of Arizona. The State and its counties are directly concerned with the result of the action with respect to the power of taxation and the benefits which may be received under the Taylar Grazing Act (48 Stat. 1269). They must, of course, as friends of the Court, take the cause as they find it; but it is only proper that they should also call to the Court's attention collateral considerations which should, if there be doubt as to the proper determination of the issue, be given consideration in arriving at a final determination. The Attorney General having withdrawn from the case (R. 215), proper evaluation by counsel for the Petitioner of the respective interests of the States and the Indians in the further presentation of the case is no longer assured.

All of these considerations have dictated the fil-

ing of this brief *amici curiae* by this State and its three named counties.

ARGUMENT

First—As to Lands in the First Cause of Action and the Taylor Grazing Act. The odd-numbered sections within the bounds of the Walapai Reservation have been taxed by the State and these counties since 1924. These lands are in any event no longer subject to taxation by the State and these counties by virtue of the transfer of any interest therein by Respondent to the United States of America (Respondent's Appendix, 77-88). If these lands be determined to be not subject to the Indian right claimed by Petitioner, the provisions of the Act of May 25, 1918 (40 Stat. 561, at 570; Sec. 211, Title 25, U. S. C. A.), which prohibits the creation of new, or extension of any existing, Indian reservations, would probably prevent them from being a part of the Walapai Reservation. They would thus be subject to the provisions of the Taylor Grazing Act (48 Stat. 1269), as amended, and this State and its counties would be entitled to the benefits to be derived by virtue of Sections 10 and 11 [U. S. C. A., Title 43, Sections 315(i) and 315(j)]. On the other hand, if it be decreed that the lands were subject to the Indian right here claimed, the contrary result would probably ensue, the lands under that view being properly included in an Indian reservation at the time of its creation. It is respectfully submitted that Respondent's presentation on the merits of this cause of action in its brief is conclusive.

Second—As to the Taxing Power of the State and its Counties. Lands subject to an Indian right

of occupancy of the sort here claimed would have no value in the hands of the railroad or any one else other than the Indians having the right of occupancy, *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, at 116, and having no value, no revenue could be derived therefrom by ad valorem taxation. The right of occupancy of the Indians would not be the subject of taxation, *The Kansas Indians*, 5 Wall. 737. As to this we respectfully urge the correctness of the views expressed in Respondent's brief as to the lands in the second cause of action.

Third—As to Certain Collateral Considerations Which Would Arise from a Decision That the Claimed Right of Occupancy was a Justiciable One.

(1) *As to State School Lands.* The Act of June 20, 1910 (36 Stat. 557), the enabling act for the admission of New Mexico and Arizona into the Union, granted to the State (Section 24) sections 2, 16, 32, and 36 in each township for support of the common schools. Much of this land has already been patented to the State.

If Petitioner's theory of a right of possession based solely upon factual occupancy be sustained by this Court, grave doubt will be cast upon the validity of the patents already issued to the State.

As to all lands to which the title has already vested in the State, examination will have to be made as to the facts which existed at the time of the vesting and from that time down to date. If the factual occupancy of an Indian tribe is not disclosed, such an examination would dispel the doubt.

If it were disclosed, the State could do nothing but wait until the tribe brought suit against the State or a method was provided for the State to sue the tribe. None now exists.

Fourth—As to Patents Under Homestead and Preemption Statutes. Rights under these statutes were initiated by settlement upon the land. The statutes offered to grant lands upon condition of settlement and cultivation. The settlers accepted the offer by settling and cultivating. After the prescribed period or the prescribed payment, patent issued. As to these patents, recognition of Petitioner's position would raise a more serious question. Settlement was essential. In the case of lands in the factual occupation of a tribe of Indians, if Petitioner's contention is correct, the settlement could only be by a wrongful invasion of the Indian right of possession. It would be a new concept of congressional morality to say that it consented to the initiation of a right to property by a wrongful act. Statutes of limitation furnish no analogy. The short answer is that these were not intended as statutes of limitation.

COMMENT

We should not pass without note that although the complaint was so drawn by Petitioner that it could rely on several alternative theories (R. 3-5, 7-10, 15-19), it abandoned all but two by the time of the hearing on the motion to dismiss and in the Circuit Court and here urges but one, i.e., that these Indians had factually occupied the lands in controversy and that factual occupancy of the character claimed for these Indians had always been recog-

nized by the United States as creating a justiciable[1] right of possession (Petitioner's Brief, 6). Recognition of the right based upon factual possession is claimed to be found in judicial decisions since the early days of the United States and in definition by legislation since 1783 (Petitioner's Brief, 16). If this claim of Petitioner is to be accepted, then we can only conclude that a factual occupancy by Indian tribes of the character claimed for the Walapai existed rather generally throughout the original United States and that it was encountered in the new territories acquired by the United States to the West. Unfortunately, Petitioner fails to give it any character, although there is a hint that it was exclusive (Petitioner's Brief, 102), and this is somewhat qualified by the suggestion that the usual nomadic tribal occupancy is sufficient (Petitioner's Brief, 97). In the complaint, in the paragraph evidently designed to take advantage of the limitation of actions theory (R. 9), the possession of the "United States and the Walapai Indians" is alleged to be exclusive; but the Petitioner has abandoned so much of the original complaint in the journey to this Court that it is difficult to say that Petitioner now claims the possession to be exclusive. The point is important. Carried to its logical conclusion it demonstrates how completely unsound is Petitioner's position. It is clear from a long line of cases dealing with similar railroad land grants, of which *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, is the latest, that if the occupancy is under a statute, treaty, or valid Executive order which reserved the

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[1]Petitioner carefully avoids characterizing the claimed right as justiciable, but, as it is seeking the intervention of a Court, it must be assumed that the claimed right is not solely a political right.

lands for the exclusive occupancy of an Indian tribe, then such lands are excepted from the grant (p. 352). If Petitioner is correct, and the factual Indian tribal occupancy of lands which it claims is recognized as giving the Indian tribe a right to possession which is exclusive, then logically such lands are as much reserved in the one case as in the other and would not be within the grant. We do not apprehend that Petitioner would attempt to make a distinction merely because in the one case a statute, treaty, or Executive order was involved, and in the other the claimed recognition of the sovereign, in some other manner still not clear. The *Northern Pacific* case, at page 348, holds that a treaty which recognizes only non-exclusive rights of occupancy in an Indian tribe does not operate to prevent the lands from passing under the grant.

If the right of occupancy based on continuous exclusive factual occupancy be recognized, it should follow that the right is coextensive with its basis and is a *right* to exclusive occupancy. Such a right should logically prevent the lands from passing under the grant at all. *United States* v. *Northern Pacific Ry. Co., supra.* But Petitioner has expressly conceded in the Circuit Court and here (Petitioner's Brief, 6) that the lands did pass. Apparently the Petitioner takes the position that exclusive factual occupancy without more gives rise only to a non-exclusive right. This refined reasoning would not be readily apparent to the mind of the ignorant savage who is to be the chief beneficiary of it.

If of two tribes each holding lands in exclusive occupancy, one with a treaty, the other without, the former can maintain its occupancy as against all

while the latter must allow invasion of its factual possession, the savage mind would consider that the existence of the treaty was the controlling element. We agree with the savage.

CONCLUSION

We have in a very brief way called to the Court's attention the considerations which are of vital interest to the State in connection with the result of this litigation. That sustaining the position of Petitioner would have far-reaching effects upon the State and its people needs no extended demonstration. The Respondent in its brief has fully and completely covered all phases of opposition to the position of Petitioner, and we submit that it completely demonstrates the unsoundness of that position. Therefore, on the merits, these *amici curiae* adopt Respondent's brief in full.

Respectfully submitted,

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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Under the second cause of action in this case the Government sought, among other forms of relief with respect to certain lands outside the present Walapai Reservation, an accounting from the respondent for "all rents, issues and profits derived from the leasing, renting or use of the lands subject to said [Walapai] right of occupancy" (R. 20).

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The Court's opinion, rendered on December 8, 1941, holds that the Walapai right of occupancy survived until the creation of the present reservation, initiated in 1881 and consummated in 1883. The opinion also holds that the grant under the act of July 27, 1866 (14 Stat. 292), upon which respondent's rights depend, was subordinate and subject to the Walapai right of occupancy until that right was extinguished. Consequently, any disposition of Walapai lands outside the reservation which the railroad made between the date of the grant and the date of the extinguishment of the tribe's interest in those lands was wrongful; and any income derived therefrom by the railroad is income for which, under the language and the reasoning of the opinion, the Government is entitled, on behalf of the Walapai Tribe, to an accounting. During this pre-reservation period, there was no distinction whatsoever between the status of the lands described in the first cause of action and that of lands described in the second cause of action. The Court, having allowed an accounting for the former lands during this period, we believe, may not consistently deny an accounting for the latter.

Thus, the statement at page 12 of the opinion that "the decree below must stand as to the second cause of action" is inconsistent with the reasoning of the opinion and with the statements made at pages 4 to 11 of the opinion; and the decree below, to conform to that reasoning, should be modified

as to the second cause of action, in the limited measure noted, instead of being simply affirmed.

For the foregoing reasons it is respectfully requested that a rehearing be allowed upon the question herein raised, or, in the alternative, that the opinion of this Court rendered on December 8, 1941, be amended to direct the modification of the decree below in such manner as will direct an accounting for income derived by respondent from the wrongful use or disposition of nonreservation lands which, on the trial, may be shown to have been aboriginally occupied by the Walapai Tribe, where such use or disposition occurred prior to the surrender of the lands by the Walapai Tribe.

Respectfully submitted.

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Of Counsel.

CERTIFICATE OF COUNSEL:

I hereby certify that this petition is presented in good faith and not for delay.

NATHAN R. MARGOLD.

DECEMBER 30, 1941.

The Solicitor General authorizes the filing of this petition.

CHARLES FAHY,
Solicitor General.

DECEMBER 31, 1941.

U. S. GOVERNMENT PRINTING OFFICE 1942

p. 5,

SUPREME COURT OF THE UNITED STATES.

No. 23.—October Term, 1941.

The United States of America, As Guardian of the Indians of the Tribe of Hualpai in the State of Arizona, Petitioner, *vs* Santa Fe Pacific Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 8, 1941.]

Mr. Justice Douglas delivered the opinon of the Court.

This is a suit brought by the United States, in its own right and as guardian of the Indians of the Walapai (Hualpai) Tribe in Arizona (28 U. S. C. § 41(1), § 24 Judicial Code) to enjoin respondent from interfering with the possession and occupancy by the Indians of certain land in northwestern Arizona. Respondent claims full title to the lands in question under the grant to its predecessor, the Atlantic and Pacific Railroad Co., provided for in the Act of July 27, 1866, 14 Stat. 292. The bill sought to establish that respondent's rights under the grant of 1866 are subject to the Indians' right of occupancy both inside and outside their present reservation which was established by the Executive Order of President Arthur, January 4, 1883. The bill consists of two causes of action—the first relating to lands inside, and the second, to lands outside, that reservation. The bill prayed, *inter alia*, that title be quieted and that respondent "account for all rents, issues and profits derived from the leasing, renting or use of the lands subject to said right of occupancy" by the Indians. Respondent moved to dismiss on the ground that the facts alleged were "insufficient to constitute a valid cause of action in equity". The District Court granted that motion. The Circuit Court of Appeals affirmed. 114 F. 2d 420. We granted the petition for certiorari because of the importance of the problems raised in the administration of the Indian laws and the land grants.

Sec. 2 of the Act of July 27, 1866, the Act under which respondent's title to the lands in question derived,[1] provided: "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

Basic to the present causes of action is the theory that the lands in question were the ancestral home of the Walapais, that such occupancy constituted "Indian title" within the meaning of § 2 of the 1866 Act, which the United States agreed to extinguish, and that in absence of such extinguishment the grant to the railroad "conveyed the fee subject to this right of occupancy". *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 66. The Circuit Court of Appeals concluded that the United States had never recognized such possessory rights of Indians within the Mexican Cession[2] and that in absence of such recognition the Walapais had no such right good against grantees of the United States.

Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which unless extinguished survived the railroad grant of 1866. *Buttz* v. *Northern Pacific Railroad, supra.*

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer* v. *United States*, 261 U. S. 219, 227. This policy was first recognized in *Johnson* v. *M'Intosh*, 8 Wheat. 543, and has been repeatedly reaffirmed. *Worcester* v. *Georgia*, 6 Pet. 515; *Mitchel* v. *United States*, 9 Pet. 711; *Choteau* v. *Molony*, 16 How. 203; *Holden* v. *Joy*, 17 Wall. 211; *Buttz* v. *Northern Pacific Railroad, supra*; *United States* v. *Shoshone Tribe*, 304 U. S. 111. As stated in *Mitchel* v. *United States, supra*, p. 746, Indian "right

[1] Earlier cases involving this grant are United States v. Southern Pacific R. R. Co., 146 U. S. 570; Atlantic & Pacific R. R. Co. v. Mingus, 165 U. S. 413; Santa Fe Pacific R. R. Co. v. Lane, 244 U. S. 492; Santa Fe Pacific R. R. Co. v. Fall, 259 U. S. 197; Santa Fe Pacific R. R. Co. v. Work, 267 U. S. 511.

[2] See Treaty of Guadalupe Hidalgo, 9 Stat. 922.

of occupancy is considered as sacred as the fee simple of the whites." Whatever may have been the rights of the Walapais under Spanish law, the *Cramer* case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Though the *Cramer* case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from "the original nomadic tribal occupancy". (p. 227.) Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson* v. *M'Intosh*, *supra*, not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations including Spain,[3] that like other rules governing titles to property (*United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 486-487) they should now be considered no longer open. Furthermore treaties[4] negotiated with Indian tribes, wholly or partially within the Mexican Cession, for delimitation of their occupancy rights or for the settlement and adjustment of their boundaries, constitute clear recognition that no different policy as respects aboriginal possession obtained in this area than in other areas. And see *United States* v. *Kagama*, 118 U. S. 375, 381. Certainly it would take plain and unambiguous action to deprive the Walapais of the benefits of that policy. For it was founded on the desire to maintain just and peaceable relations with Indians. The reasons for its application to other tribes are no less apparent in case of the Walapais, a savage tribe which in early days caused the military no end of trouble.

Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any stat-

[3] Chouteau v. Molony, *supra*; Buttz v. Northern Pacific Railroad, *supra*; Cramer v. United States, *supra*; United States v. Shoshone Tribe, *supra*. See Royce, Indian Land Cessions in the United States, 18 Publications of the Bureau of American Ethnology, Smithsonian Institution, Pt. 2 (1899) pp. 539-561, 639-643.

[4] Treaty of July 1, 1852, 10 Stat. 979 (Apache Nation); Treaty of October 7, 1863, 13 Stat. 673, 674 (Tabeguache Band of Utah Indians); Treaty of March 2, 1868, 15 Stat. 619, Act of April 29, 1874, 18 Stat. 36, Act of June 15, 1880, 21 Stat. 199 (Ute Indians); Treaty of June 1, 1868, 15 Stat. 667 (Navajo Tribe). For a schedule of Indian land cessions see Royce, *op. cit.*, *supra* note 3, pp. 648 *et seq.*

ute or other formal governmental action is not conclusive." 261 U. S. at 229.

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political not justiciable issues. *Buttz* v. *Northern Pacific Railroad, supra*, p. 66. As stated by Chief Justice Marshall in *Johnson* v. *M'Intosh, supra*, p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher* v. *Wetherby*, 95 U. S. 517, 525.

If the right of occupancy of the Walapais was not extinguished prior to the date of definite location of the railroad in 1872, then the respondent's predecessor took the fee subject to the encumbrance of Indian title. *Buttz* v. *Northern Pacific Railroad, supra*. For on that date the title of respondent's predecessor attached as of July 27, 1866. *United States* v. *Southern Pacific R. R. Co.*, 146 U. S. 570; *Nelson* v. *Northern Pacific Ry. Co.*, 188 U. S. 108.

Certainly prior to 1865 any right of occupancy of the Walapais to the lands in question was not extinguished; nor was the policy of respecting such Indian title changed. The Indian Trade and Intercourse Act of June 30, 1834, 4 Stat. 729, was extended over "the Indian tribes in the Territories of New Mexico and Utah" by § 7 of the Act of February 27, 1851, 9 Stat. 574, 587. The 1834 Act, which derived from the Act of July 22, 1790, 1 Stat. 137, made it an offense to drive stock to range or feed "on any land belonging to any Indian or Indian tribe, without the consent of such tribe" (§ 9); gave the superintendent of Indian affairs authority "to remove from the Indian country all persons found therein contrary to law" (§ 10); made it unlawful to settle on "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe" (§ 11); and made invalid any conveyance of lands "from any Indian nation or tribe of Indians." § 12. The Act of 1851 obviously did not create any Indian right of occupancy which did not previously exist. But it plainly indicates that in 1851 Congress desired to continue in these territories the unquestioned general policy of the Federal government to recognize such right of occupancy. As stated by Chief Justice Marshall in *Worcester* v.

Georgia, supra, p. 557, the Indian trade and intercourse acts "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States."

The court below laid considerable stress upon the Act of July 22, 1854, 10 Stat. 308, as indicating that Congress recognized no rights of the Indians in Arizona and New Mexico other than those existing under Mexican law or created by reservations after the Mexican Cession. But we do not agree that, so far as the respondent's rights are concerned, that Act instituted a policy of non-recognition of Indian title. Nor do we think that it effected any extinguishment of that title.

The Act of 1854 established the office of Surveyor General of New Mexico. It donated land to certain qualified citizens (§ 2) with the exception, *inter alia*, of "military or other reservations". § 4. Unlike the Pre-Emption Act of September 4, 1841, § 10, 5 Stat. 453, the 1854 Act did not extend only to "the public lands to which the Indian title had been at the time of such settlement extinguished." It did provide, however, that "any of the lands not taken" under it should "be subject to the operation" of the Pre-Emption Act. § 7. Moreover, the 1854 Act provided as respects the Territories of Nebraska and Kansas that the grants should extend only to lands "to which the Indian Title has been or shall be extinguished." § 12.

From that it is argued that since Congress recognized Indian title in Nebraska and Kansas and under the Pre-Emption Act but did not recognize it as respects the lands in this area, a shift of policy in the Mexican Cession was indicated. The issue here, however, is not between a settler claiming under the 1854 Act and the Walapais. Whether in such a case the 1854 Act should be construed as extinguishing any Indian title to land taken under it we need not decide.[5] Respondent does not claim under that Act and hence can derive no rights from it.

Some stress is likewise placed on § 8 of the Act of July 22, 1854, and on the Act of July 15, 1870, 16 Stat. 291, 304. The

[5] The Act of 1854 is cited in Cohen, Handbook of Federal Indian Law (1941) p. 308, for the statement that, "Only where it was necessary to give emigrants possessory rights to parts of the public domain, has Congress ever granted tribal lands in disregard of tribal possessory rights."

former required the Surveyor General for New Mexico "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico"; and to make a report "on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo . . . denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States." Such report was to be "laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect" to the treaty. It was also provided that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of the Act." The 1870 Act directed the Surveyor General for Arizona (which was separated as a Territory from New Mexico in 1863, 12 Stat. 664) "to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory under the laws, usages, and customs of Spain and Mexico." His report was to be "laid before Congress for such action thereon as shall be deemed just and proper."

These Acts did not extinguish any Indian title based on aboriginal occupancy which the Walapais may have had. In that respect they were quite different from the Act of March 3, 1851, 9 Stat. 631, passed to ascertain and settle certain land claims in California. Under § 13 of that Act "all lands the claims to which shall not have been presented" to the commissioners, appointed to receive and act upon all petitions for confirmation of land claims, "within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States." This Court passed on that Act in *Barker* v. *Harvey*, 181 U. S. 481. The plaintiff there claimed under two Mexican grants. The defendants were Indians who claimed a right of permanent occupancy; but they had not presented their claims to the commissioners within the time specified by § 13. This Court held that as a result of that failure their claims were barred. And see *United States* v. *Title Insurance & Trust Co.*, *supra*. That is to say, the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian

right of occupancy. Since Congress had provided a method for extinguishment, its appropriateness raised only a political not a justiciable issue. The Acts of 1854 and 1870, unlike the Act of 1851, merely called for a report to Congress on certain land claims. If there was an extinguishment of the rights of the Walapais, it resulted not from action of the Surveyor General but from action of Congress based on his reports.[6] We are not advised that Congress took any such action. In its absence we must conclude that these Acts were concerned not with the problem of ascertaining the boundaries of Indian country but with the problem of quieting titles originating under Spanish or Mexican grants. For it should be noticed that § 8 of the 1854 Act contemplated confirmation by Congress of "*bona fide* grants".

This brings us to the Act of March 3, 1865, 13 Stat. 541, 559, which provided: "All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries." It is plain that the Indians referred to included the Walapais. The suggestion for removing various Indian tribes in this area to a reservation apparently originated with a former Indian agent, Superintendent Poston, who was a Territorial Representative in Congress in 1865. His explanation[7] on the floor of the House of the bill, which resulted in

[6] The various reports of the Surveyor General are found in the annual reports of the Secretary of the Interior from 1855 through 1890, when the Court of Private Land Claims was constituted. Act of March 3, 1891, 26 Stat. 854. Sec. 15 of that Act repealed § 8 of the Act of 1854. Under § 13 of the 1891 Act it was provided: "No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place."

[7] Cong. Globe, 38th Cong., 2d Sess., March 2, 1865, p. 1320: "As superintendent of Indian affairs, I called the confederated tribes of the Colorado in council together. The council was attended by the principal chiefs and headmen of the Yumas, Mojaves, Yapapais, Hualapais, and Chemihuevis. These tribes have an aggregate of ten thousand souls living near the banks of the Colorado, from Fort Yuma to Fort Mojave. . . .

"But as the representative of the Government of the United States at that time, I did not undertake to make a written treaty with these Indians, because I considered that the Government was able and willing to treat them fairly and honestly without entering into the form of a written treaty, which has been heretofore so severely criticised in both Houses of Congress, and with some reason. These Indians there assembled were willing, for a small amount of beef and flour, to have signed any treaty which it had been my pleasure to write. I simply proposed to them that for all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States, they should abandon that Territory and confine themselves to the elbow in the Colorado river, not more than seventy-

the creation of the 1865 reservation, indicates that he had called a council of the confederated tribes of the Colorado, including the Walapais, and had told them that "they should abandon" their lands and confine themselves to the place on the Colorado river which was later proposed for a reservation. He entered into no agreement with them nor did he propose a treaty. He merely stated that if elected to Congress he would try to get Congress to provide for them. As stated by the Commissioner of Indian Affairs in 1864, "Assuming that the Indians have a right of some kind to the soil, Mr. Poston's arrangement proposes a compromise with these Indians, by which on their confining themselves to their reservation and yielding all claims to lands beyond it, they shall, in lieu of an annuity in money or supplies, be furnished by government with an irrigating canal, at a cost estimated at something near $100,000 which, by insuring them their annual crops, will enable them to support themselves, independently of other aid by the government."[8]

We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was

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five thousand acres. But I did not enter into any obligation on account of the United States to furnish them with seeds and agricultural implements. I simply told them that if I was elected to represent that Territory in this Congress, I would endeavor to lay their claims before the Government, which they understood to be magnanimous, and that I hoped that this Congress would have the generosity and the justice to provide for these Indians, who have been robbed of their lands and their means of subsistence, and that they may be allowed to live there where they have always made their homes. They desire to live as do the Pueblo Indians of New Mexico and Arizona. Those Pueblo Indians live in settlements, in towns, in reservations, according to the wise policy of the Spanish Government, which colonized the Indians in reservations and made their labor valuable in building improvements for their own sustenance, for churches, and public improvements, and in that manner made them peaceable Indians, instead of having everlasting and eternal war with the people whom they had robbed of their land.

"These people having been citizens of the Mexican Government, are not, according to our theory, entitled to any right in the soil; and therefore no treaty with these Indians for the extinction of their title to the soil would be recognized by this Government. It is a fiction of law which these Indians, in their ignorance, are not able to understand. They cannot see why the Indians of the Northeast have been paid annuities since the foundation of this Government for the extinction of their title, while the Indians who were formerly subject to the Spanish and Mexican Governments are driven from their lands without a dollar. It is impossible for these simple-minded people to understand this sophistry. They consider themselves just as much entitled to the land which their ancestors inhabited before ours landed on Plymouth Rock as the Indians of the Northeast. They have never signed any treaty relinquishing their right to the public domain."

[8] Report of the Secretary of the Interior, Dec. 5, 1864, p. 165.

doing more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home.[9] That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate* v. *Trapp*, 224 U. S. 665, 675, the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." And see *Minnesota* v. *Hitchcock*, 185 U. S. 373, 395-396. Nor was there any plain intent or agreement on the part of the Walapais to abandon their ancestral lands if Congress would create a reservation. Furthermore, the Walapais did not accept the offer which Congress had tendered. In 1874 they were, however, forcibly removed to the Colorado River reservation on order from the Indian Department.[10] But they left it in a body the next year.[11] And it was decided "to allow them to to remain in their old range during good behavior."[12] They did thereafter remain in their old country and engaged in no hostilities against the whites. No further attempt was made to force them onto the Colorado River reservation, even though Congress had made

[9] Respondent also places some stress on the Act of April 20, 1871, 17 Stat. 19, in which Congress permitted respondent's predecessor to mortgage its property. But as stated in Leavenworth, L. & G. R. R. Co. v. United States, 92 U. S. 733, 753, "... title to lands is not strengthened by giving a mortgage upon them; nor can the fact that it has been given throw any light upon the prior estate of the mortgagor." And see Atlantic & Pacific R. R. Co. v. Mingus, 165 U. S. 413, 430, where this Court in speaking of the purpose of the Act of April 20, 1871, said: "The original act being silent upon the subject of mortgaging the grant, there is reason to suppose that Congress passed the act for the purpose of resolving any doubts that capitalists may have entertained with respect to such power. The mortgagees, standing in the place of the mortgagor, had no greater rights than it had, and must be held to have known that they were taking an estate which was defeasible upon condition broken."

[10] Walapai Papers, S. Doc. No. 273, 74th Cong., 2d Sess., pp. 96-98. Though the Walapais were at peace with the whites prior to 1866 (*id.* p. 92) the killing of their head chief by a white led to hostilities which continued for a few years. *Id.* pp. 37-94.

[11] Walapai Papers, *op. cit.*, p. 104.

[12] Walapai Papers, *op. cit.*, p. 104.

various appropriations to defray the costs of locating the Arizona Indians in permanent abodes (Act of March 3, 1865, 13 Stat. 541, 559; Act of July 27, 1868, 15 Stat. 198, 219; Act of July 15, 1870, 16 Stat. 335, 357), including the Colorado River reservation. Act of March 2, 1867, 14 Stat. 492, 515; Act of May 29, 1872, 17 Stat. 165, 188. On these facts we conclude that the creation of the Colorado River reservation was, so far as the Walapais were concerned, nothing more than an abortive attempt to solve a perplexing problem. Their forcible removal in 1874 was not pursuant to any mandate of Congress. It was a high-handed endeavor to wrest from these Indian lands which Congress had never declared forfeited.[13] No forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement on the reservation unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read. Certainly a forced abandonment of their ancestral home was not a "voluntary cession" within the meaning of § 2 of the Act of July 27, 1866. *Atlantic & Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413, 438-439.

The situation was, however, quite different in 1881. Between 1875 and that date there were rather continuous suggestions for set-

[13] See Walapai Papers, *op. cit.*, p. 108. General Schofield reported on May 24, 1875, to the Adjutant General as follows:

"The Hualpai Indians have been our firm friends for many years, and our active allies whenever their services have been required against the hostile Apaches. In return for their fidelity they have been treated with great injustice and cruelty. They were forced to leave their homes in the mountains and go upon a reservation in the Colorado desert, where they have suffered from the extreme heat, to which they were unaccustomed, from disease, and from hunger.

"This was done in spite of the protest of the Military commanders who were familiar with the wants of these Indians and were anxious to repay by kind treatment the faithful services they had rendered. The Indians were bitterly opposed to this change, and it was only the great influence which Gen'l. Crook and Captain Byrne had acquired over them that enabled the removal to be made without war.

"The Indian Agent, having seen fit to relinquish the aid of this powerful influence, the effect was at once manifest in the return of the Hualpais to their former homes.

"I am decidedly opposed to the use of any coercive measures to force them back upon the Colorado reservation.

"The injustice and bad faith shown by the government toward the Hualpais and the Indians which Gen l. Crook had collected upon the Verde reservation are calculated to undo as far as possible the good work which Gen'l. Crook and his troops had accomplished with so much wisdom and gallantry. It is useless to attempt to disguise the fact that such treatment of the Indians is in violation of the just and humane policy prescribed by the President and a disgrace to any civilized country."

tling the Walapais on some reservation.[14] In 1881 the matter came to a head. A majority of the tribe, "in council assembled", asked an officer of the United States Army in that region "to aid them and represent to the proper authorities" the following proposal:[15] "They say that in the country, over which they used to roam so free, the white men have appropriated all the water; that large numbers of cattle have been introduced and have rapidly increased during the past year or two; that in many places the water is fenced in and locked up; and they are driven from all waters. They say that the Railroad is now coming, which will require more water, and will bring more men who will take up all the small springs remaining. They urge that the following reservation be set aside for them while there is still time; that the land can never be of any great use to the Whites; that there are no mineral deposits upon it, as it has been thoroughly prospected; that there is little or no arable land; that the water is in such small quantities, and the country is so rocky and void of grass, that it would not be available for stock raising. I am credibly informed, and from my observations believe, the above facts to be true. I, therefore, earnestly recommend that the hereafter described Reservation be, at as early a date as practicable, set aside for them."

Pursuant to that recommendation the military reservation was constituted on July 8, 1881, subject to the approval of the President.[16] The Executive Order creating the Walapai Indian Reservation was signed by President Arthur on January 4, 1883.[17] There was an indication that the Indians were satisfied with the proposed reservation.[18] A few of them thereafter lived on the reservation; many of them did not.[19] While suggestions recurred for the creation of a new and different reservation,[20] this one was

[14] Walapai Papers, *op. cit.*, pp. 113-131.

[15] Walapai Papers, *op. cit.*, pp. 134-135. For a strikingly close version of this episode as related in 1931 by a member of the Walapai tribe who was present at the conference in 1881 between the council of the tribe and the United States Army officer, see Walapai Papers, pp. 247-249.

[16] Walapai Papers, *op. cit.*, pp. 135-136.

[17] Walapai Papers, *op. cit.*, p. 146. As to the validity of a reservation established by Executive Order, see United States v. Midwest Oil Co., 236 U. S. 459. Spalding v. Chandler, 106 U. S. 394. General Indian Allotment Act of February 8, 1887, 24 Stat. 388, § 1; 34 Op. A. G. 181, 186-189.

[18] Walapai Papers, *op. cit.*, p. 136.

[19] Walapai Papers, *op. cit.*, pp. 163, 165-168, 178, 198.

[20] Walapai Papers, *op. cit.*, pp. 151, 161-165.

not abandoned. For a long time it remained unsurveyed.[21] Cattle men used it for grazing and for some years the Walapais received little benefit from it.[22] But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands[23] which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by "voluntary cession" within the meaning of § 2 of the Act of July 27, 1866. The lands were fast being populated. The Walapais saw their old domain being preempted. They wanted a reservation while there was still time to get one. That solution had long seemed desirable in view of recurring tensions between the settlers and the Walapais. In view of the long standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. That would make the creation of the 1883 reservation, as an attempted solution of the violent problems created when two civilizations met in this area, illusory indeed. We must give it the definitiveness which the exigencies of that situation seem to demand. Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others. Cf. *Marsh* v. *Brooks*, 14 How. 513; *Shoshone Trib.* v. *United States*, 299 U. S. 476.

On January 23, 1941, the date of the filing of this petition for certiorari, respondent quit claimed to the United States, under § 321(b), Pt. III of the Interstate Commerce Act (Transportation Act of 1940, 54 Stat. 929, 954) all lands claimed by it under the Act of July 27, 1866, within the Walapai Indian Reservation. Since the decree below must stand as to the second cause of action and since by virtue of the quitclaim deeds the United States has received all the lands to which the first cause of

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[21] Walapai Papers, *op. cit.*, pp. 192, 196.

[22] Walapai Papers, *op. cit.*, pp. 179, 183.

[23] As distinguished from individual rights of occupancy, if any, as were involved in Cramer *v.* United States, *supra*, but which, not being in issue here, are not foreclosed or affected by the judgment in this case.

actions relates, the decree will not be reversed. It is apparent, however, that it must be modified so as to permit the accounting as respects lands in the first cause of action. It does not appear whether those lands were included in the ancestral home of the Walapais in the sense that they were in whole or in part occupied exclusively by them or whether they were lands wandered over by many tribes. As we have said, occupancy necessary to establish aboriginal possession is a question of fact. The United States is entitled to an accounting as respects any or all of the lands in the first cause of action which the Walapais did in fact occupy exclusively from time immemorial.[24] Such an accounting is not precluded by the Act of February 20, 1925, 43 Stat. 954, which authorized the Secretary of the Interior "to accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation". The implication is that there may be some land within the reservation that is not subject to Indian occupancy. But that Act certainly cannot be taken as an extinguishment of any and all Indian title that did exist or as a repeal by implication of § 2 of the Act of July 27, 1866, requiring such extinguishment by "voluntary cession". It was passed so that lands "retained for Indian purposes may be consolidated and held in a solid area so far as may be possible."[25] Such statements by the Secretary of the Interior as that "title to the odd-numbered sections" was in the respondent[26] do not estop the United States from maintaining this suit. For they could not deprive the Indians of their rights any more than could the unauthorized leases in *Cramer* v. *United States*, *supra*.

Hence an accounting as respects such lands in the reservation which can be proved to have been occupied by the Walapais from time immemorial can be had. To the extent that the decree below precludes such proof and accounting, it will be modified. And as so modified, it is

Affirmed.

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[24] In case of any lands in the reservation which were not part of the ancestral home of the Walapais and which had passed to the railroad under the 1866 Act, the railroad's title would antedate the creation of the reservation in 1883 and hence not be subject to the incumbrance of Indian title.

[25] H. Rep. No. 1446, 68th Cong., 2d Sess., p. 1. So far as appears there were no reconveyances under that Act. It apparently was, however, the occasion for precipitating the present litigation.

[26] *Id.* And see Walapai Papers, *op. cit.*, pp. 320-321.